86-270

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1986

SAN FRANCISCO ARTS & ATHLETICS, INC.
and DR. THOMAS F. WADDELL,

Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE and
INTERNATIONAL OLYMPIC COMMITTEE,

Respondents.

On Petition For Writ Of Certiorari To
The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. IN ENACTING THE AMATEUR SPORTS ACT OF 1978, 36 U.S.C. SECS. 371 ET SEQ., DID CONGRESS INTEND TO BESTOW UPON THE UNITED STATES OLYMPIC COMMITTEE AN EXCLUSIVE AUTHORITY TO PROHIBIT AND ENJOIN VIRTUALLY ANY AND EVERY USE OF THE WORD "OLYMPIC"?

2. ARE THE WELL-ESTABLISHED TENETS OF TRADEMARK LAW THAT GENERIC TERMS CANNOT BE TRADEMARKS AND THAT A PARTY MAY USE AN OTHERWISE INCONTESTABLE TRADEMARK FAIRLY TO DESCRIBE ITS GOODS OR SERVICES ROOTED IN FIRST AMENDMENT CONSIDERATIONS OF PRESERVING FREEDOM OF SPEECH AND PROTECTING THE RICHNESS OF THE HUMAN VOCABULARY AGAINST CLAIMS OF PRIVATE OWNERSHIP?

3. GIVEN THAT USOC WAS CREATED AND CHARTERED BY CONGRESS TO PERFORM A PUBLIC FUNCTION, AND GIVEN THAT USOC RECEIVES AND USES SUBSTANTIAL PUBLIC RESOURCES TO THAT END, IS USOC ENGAGED IN "STATE ACTION" SUCH THAT IT MAY NOT VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS BY SELECTING AMONG DIVERSE POTENTIAL USERS OF THE WORD "OLYMPIC", BASED UPON SPEECH-SUPPRESSING AND INVIDIOUSLY DISCRIMINATORY MOTIVES?

4. CAN AN INJUNCTION PROHIBITING USE OF "OLYMPIC" BY A NONPROFIT CORPORATION THAT IS TANGENTIALLY ENGAGED IN RAISING MONEY FOR ITS CAUSE BE RECONCILED WITH TRADEMARK INFRINGEMENT AND COMMERCIAL SPEECH PRECEDENTS THAT REQUIRE BALANCING OF THE GOVERNMENTAL INTERESTS IN REGULATING FRAUDULENT COMMERCIAL SPEECH AGAINST FREE SPEECH INTERESTS?

5. IF THE AMATEUR SPORTS ACT OF 1978 SETTLED NOTHING MORE OR LESS THAN AN INCONTESTABLE TRADEMARK UPON USOC AS TO THE WORD "OLYMPIC", SHOULD THAT TRADEMARK BE ENFORCED ACCORDING TO THE STANDARD OF PROOF AND DEFENSES TO TRADEMARK INFRINGEMENT, AS WELL AS THE STANDARD FOR AWARDING ATTORNEYS' FEES, DEVELOPED OVER FORTY YEARS OF LITIGATION UNDER THE TRADEMARK ACT OF 1946?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit on the merits of this case is reported at 781 F.2d 733 (9th Cir. 1986) and is set out in the Appendix (App.) at part 1. The order denying en banc review and amending that opinion is set out at App. part 2. The opinion of the judges dissenting from the denial of rehearing and rejection of

en banc review is set out at App. part 3. The oral opinion of the U.S. District Court for the Northern District of California granting summary judgment and its written opinion awarding attorneys' fees are unreported, and are set out at App. parts 4 and 5. The judgment and permanent injunction are set out at App. part 6. The opinion of the U.S. District Court granting a preliminary injunction against petitioners is reported at 219 U.S.P.Q. 983 (N.D.Cal. 1982) and is set out at App. part 7. The preliminary injunction was affirmed by the Court of Appeals, 707 F.2d 517 (9th Cir. 1983); the Court of Appeals issued a written unpublished opinion that is set out at App. part 7. The District Court's order granting preliminary injunction is reported at 219 U.S.P.Q. 983 (N.D.Cal. 1982) and is set out at App. part 8.

JURISDICTION

The decision of the Court of Appeals of which review is sought was issued on January 27, 1986. A timely petition for rehearing and suggestion for rehearing en banc was filed on February 10, 1986; it was denied on May 22, 1986. No application for an extension of time to file this petition for certiorari has been made. This Court's jurisdiction is invoked under 28 U.S.C.sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Amateur Sports Act of 1978, 36 U.S. Code section 371 et seq., provides in pertinent part as follows:

> "(a) Without the consent of [USOC], any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition---
> (4) the words "Olympic", "olympiad", "Citius Altius Fortius,", or any combination thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with [USOC] or any Olympic activity; . . .
> shall be subject to suit in a civil action by the [USOC] for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946) . .".
>
> (c) [USOC] shall have exclusive right to use . . . the words 'Olympic', 'Olympiad', 'Citius Altius Fortius' or any combination thereof subject to the preexisting rights described in subsection (a)."
> 36 U.S.Code section 380(a)(4)& (c)(1982).

The constitutional guarantees that are involved in this petition for certiorari include:

> "Congress shall make no law...abridging the freedom of speech...",
> Amend. I (1791),
>
> and,
>
> "No State shall ...deny to any person within its jurisdiction the equal protection of the laws."
> Amend. XIV (1868).

STATEMENT OF THE CASE

Statement of Facts

Petitioner San Francisco Arts & Athletics Inc. (SFA&A) is a California non-profit corporation in good standing that is chartered to conduct public cultural events, including athletic competitions and arts activities, "...to educate the general public on the vitality, variety and versatility of the gay movement." (Dkt.17 at Ex.DD)[1] In August 1982, what was supposed to be called "Gay Olympic Games I" was staged by SFA&A in San Francisco, California.

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[1] Those parts of the record that are not published in the Excerpts of Record on appeal in the U.S. Court of Appeals for the Ninth Circuit are cited by Docket number ("Dkt.). Those parts of the record that are published in the Excerpts of Record on appeal in the U.S. Court of Appeals for the Ninth Circuit are cited as Excerpts ("E.") and by page number(s).

This was an international athletic competition welcoming athletes of every sexual orientation to compete in a variety of athletic contests, including numerous traditional Greek Olympic events, in order to "help balance the onslaught of the Moral Majority's perspective" (Dkt.17 at Ex.H) as to homosexuals and to "demonstrate [the gay2 community's] non-commercial involvement in a healthy endeavor" (Dkt.17 at Ex.J). The competition did not proceed as "Gay Olympic Games I" because the United States Olympic Committee (USOC) and International

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2 The terms "gay" and "lesbian" are used in this petition to connote persons of homosexual orientation having the common cause of overcoming homophobia and discrimination. Cf. Cyr v. Walls, 439 F.Supp. 697 (N.D.Tex. 1977).

Olympic Committee (IOC) secured a preliminary injunction preventing petitioners SFA&A and Waddell and their agents from any use of "olympic" in conjunction with their planned event. Petitioners strictly obeyed that injunction by excising the word from t-shirts, posters, literature including media articles, and from their vocabularies relative to Gay Games I.(Dkt.15-28; E.167).

While carefully conforming their speech and conduct to the terms of all court orders in this case, defendants SFA&A and Waddell claim a right to use the term "olympic" as a political and symbolic word which they selected for its generic power to identify and describe their proposed "Gay Olympic Games" in 1982, in 1986, and quadrennially thereafter into the indefinite future.

(Dkt.17,20,25,26) SFA&A used "olympic", until enjoined, only in the context of the word "gay" as related to the upcoming "Gay Olympic Games I". At no time have SFA&A and Dr. Waddell used or sought to use any other statutorily protected symbol, emblem or insignia of USOC or the Olympics, other than the word "olympic". (Dkt.17 at Ex.'s H-Y; 18). No evidence of any intent by SFA&A or its participants to confuse, mislead or deceive the public as to any association with USOC or official Olympic activities, nor of any result of confusion or deception, was adduced below. SFA&A has sought no association or relation with USOC or the Olympics, and openly criticized "the traditional Olympics" in its literature. (Dkt.17 at Ex.I) Indeed, in an effort to resolve this dispute before suit was filed in 1982, SFA&A and Waddell by their attorney offered to place the words "not

associated with the U.S. Olympic Committee or any Olympic activity" upon all of their goods, literature and properties.(Dkt.5).

SFA&A has established beyond dispute that there are numerous public uses of the word "olympics" by a vast array of organizations and interest groups, to promote athletic and other competitions. For example, there is an "International Police Olympics" whose promoters use the word "Olympics" and a five-ring symbol, and stage a series of traditional Olympic athletic events, which since at least 1980 has been staged annually with the knowledge of USOC. To date the organizers and promoters of the "International Police Olympics" have not been sued by USOC. (E. 167; Dkt.17 at Ex.'s F and Z). There are competitions throughout the United States called "Olympics" for firefighters, drinkers of

alcohol, senior citizens, crab-cookers, chili-makers, baby-diaperers and Armenians, to name a few. (Dkt.17 at Ex.'s BB,EE and App.1). While openly endorsing use of "olympic" in the Special Olympics, Junior Olympics and Explorer Olympics, and tacitly approving it in cases such as the Police Olympics, USOC has sued at least two politically controversial users of the term, SFA&A in conjunction with the "Gay Olympics" in the instant litigation, and a nonprofit organization that sought to protest USOC's involvement in construction of a prison at Lake Placid, New York. Stop The Olympic Prison v. USOC, 489 F.Supp. 1112 (S.D.N.Y. 1980).

In sum, this case comes to this Court as a dispute about the use of an historic, popular and common English word by a non-profit corporation and its associates in essentially non-commercial

circumstances, where an uncertain and undefined power to control use of that word has been bestowed upon an entity created and chartered by Congress to perform certain public functions.

Procedural History Of Case

This case began by the filing of a civil action by USOC and IOC against SFA&A and Waddell, its then-President, in the U.S. District Court for the Northern District of California on August 9, 1982. (E.1) The gist of that complaint was that SFA&A was using "olympic" without USOC's consent to promote the "Gay Olympic Games" of 1982, set to commence in San Francisco on August 25, 1982. (E.1-13,153) SFA&A and Waddell answered that complaint, and counterclaimed for violations of their rights to free speech and association and equal protection of the laws. (E.14-27) USOC secured a

preliminary injunction against virtually every use of the word "olympic" by SFA&A and its associates, and that preliminary injunction was upheld on appeal by the U.S. Court of Appeals for the Ninth Circuit. (App.7&8; Dkt.33-35).

After discovery, USOC moved for summary judgment and a permanent injunction against petitioners SFA&A and Waddell: USOC never pressed nor proved any claim for damages. (E.76-121) Asserting that the matters of state action, likelihood of confusion, fair use in description and the intent of SFA&A in using "olympic", and the discriminatory and speech-suppressing behavior of USOC raised triable disputes of material fact as to the claim of trademark infringement under the Amateur Sports Act of 1978 and the counterclaims, SFA&A opposed that motion. (E.122-169) Summary judgment and

a permanent injunction against use of "olympic" by SFA&A were granted (App.4&6; E. 28-30), and an appeal of that judgment and injunction followed. (E.91)

The trial court then granted ninety-six thousand six hundred dollars ($96,600.) as attorneys fees' against the non-profit corporation and its chief volunteer in favor of USOC and IOC, determining inter alia that petitioners' use of "olympic" constituted a wilful, deliberate, malicious and/or fraudulent trademark infringement and that "[a]n award of attorney's fees in this case also promotes the goals of the Amateur Sports Act...[b]ecause the USOC is the only National Olympic Committee that does not receive formal financial assistance from its host government". (App.5; E.31-35).

The U.S Court of Appeals for the

Ninth Circuit affirmed the grant of summary judgment and of a permanent injunction against SFA&A and Waddell, and reversed and remanded the attorneys' fees award. (App.1) On May 22, 1986, the Court of Appeals denied the petition for rehearing and rejected the suggestion for en banc reconsideration. (App.2) Three judges of the Court of Appeals dissented from that order, in a written opinion by Judge Alex Kozinski. (App.3) This petition for certiorari timely follows within ninety (90) days from the order denying rehearing and refusing en banc review, as required by Supreme Court rule 20.2.

REASONS FOR GRANTING THE WRIT

I. IN HOLDING THAT CONGRESS HAD THE INTENT TO BESTOW A "TRADEMARK-PLUS" UPON USOC, AND THAT USOC NEED NOT PROVE ANY TENDENCY OF AN UNCONSENTED-TO USE OF "OLYMPIC" TO CAUSE CONFUSION NOR EVEN A TRADEMARK USE, IN ORDER TO ENJOIN THE USE OF "OLYMPIC", THE COURT OF APPEALS IGNORED THE PLAIN LANGUAGE AND HISTORY OF THE STATUTE AND RENDERED A DECISION THAT UNNECESSARILY IMPLICATES THE CONSTITUTIONALITY OF A FEDERAL STATUTE.

In enacting section 380 of the Amateur Sports Act, Congress plainly used language creating a trademark in USOC, inter alia, as to the word "Olympic". 36 U.S.Code section 380 is couched entirely in trademark law formulae. The language bestowing an "exclusive right to use...'Olympic'" upon USOC, 36 U.S.C.sec.380(c), closely parallels the "exclusive right to use" language as to registered trademarks in the Lanham Act, 15 U.S.C.sec. 1115(b). The clause prohibiting unconsented-to use of

"Olympic" is framed in terms of the declared intent of Congress to enable USOC to prohibit use of this term where "tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with [USOC] or any Olympic activity". 36 U.S.C.sec. 380(a)(4).

In commenting on the relevant sections of the bill that became the Amateur Sports Act of 1978, the Commissioner of Patents & Trademarks stated in pertinent part:

> "The present bill does not make the use of the various designations...unlawful. It merely subjects the user of such designation to a civil suit when the designation is used in connection with the sale of any goods or services, or for promotional activities."
>
> 1978 U.S.Cong.& Admin.News 7496.

By section 380, "[w]ithout the consent of [USOC], any person who uses [Olypmic] for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition...shall be subject to suit ...by [USOC] for the remedies provided in the ...Trademark Act of 1946." The prior legal provision of a criminal penalty for any unauthorized use of "Olympic" and other words and symbols protected by the Act had proved unenforceable because of the requirement of proving criminal intent. 1978 U.S.Cong. & Admin. News 7488. Accordingly, in response to the letter quoted above, Congress enacted a law enabling USOC to "protect...the word...'Olympic'...by civil action pursuant to the Trademark Act of 1946." 1978 U.S.Cong.& Admin. News 7488.

The first federal court to interpret this statutory language and history concluded that section 380 was intended to bestow a trademark upon USOC as to "Olympic", that this trademark and the exclusive right of use were no more extensive than those bestowed upon registered trademarks under the Lanham Act, and that the purpose of the enactment was "to prevent all persons other than USOC from registering the Olympic words and symbols as trademarks...rather than as a blanket prohibition of all uses whether commercial or not." Stop The Olympic Prison v. USOC, 489 F.Supp. 1112, 1118-1121 (S.D.N.Y. 1980).

In ignoring the history and language of section 380(a)(4) and its interpretation in the STOP opinion, and in holding that Congress' grant of

authority to USOC as to uses of "olympic" exceeds trademark boundaries, the Court of Appeals in this case violated the basic rule that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language expresses the legislative purpose." (citation omitted) Park 'N Fly v. Dollar Park 'N Fly, _U.S._, 105 S.Ct. 658, 662 (1985). The language employed by Congress in section 380, and its ordinary meaning as developed under the Lanham Act, dictates the simple conclusion that Congress bestowed a trademark upon USOC as to "Olympic", enforceable under the terms of pre-existing trademark law.

In holding to the contrary, that section 380 gave USOC the power to prohibit all uses of "Olympic" by any person, whether or not for commercial and

trademark purposes and whether or not the uses tended to cause confusion, the Court of Appeals in the instant case seriously misinterpreted the Act. In its declared foundation upon the Lanham Act, in its explicit use of trademark law terms of art, and in its legislative history establishing the purpose of according trademark protection to USOC as to "Olympic", Congress plainly bestowed a trademark upon USOC. The Court of Appeals' interpretation defies all of those unmistakable indicators of the meaning of the statute.

In holding that Congress intended to enable USOC to prohibit non-profit corporations and public interest groups, incidentally engaged in "trade" to the extent of selling items and promoting contests to raise money for their non-profit causes, from using the term

"Olympic", regardless of whether such uses have any "tend[ency] to cause confusion...[as to] a connection with [USOC] or any Olympic activity", 36 U.S.C.sec.380(a)(4), the Court of Appeals in the instant case rendered a decision that excises controlling language and lucid history from interpretation of the statute. These excisions do not serve Congress' intent to bestow a lawful trademark upon USOC. To the contrary, they aggrandize that intent, beyond recognition in the terms of the statute, in a fashion that creates great and unnecessary constitutional trouble.

A best-selling book containing the term "Olympic", particularly in its title or on its cover, whose author fails to secure USOC's consent to use the word, violates section 380 under the Court of Appeals' interpretation in this case,

unless the author gives the book away free of charge. A newspaper or magazine containing the term "Olympic" in a headline (which may be argued to have "induce[d] the sale" of the publication) violates section 380 and its publication may be enjoined, according to the Court of Appeals' decision. A play, contest or performance whose creators use "olympic" to promote it, or use the word in any items for sale may be enjoined by USOC, and the profits (if any) seized. By the Court of Appeals' reading of section 380, any group, whether it is composed of gay persons demonstrating concern for health and nondiscrimination or the NAACP sponsoring an "academic olympics" to show black schoolchildren's intellectual achievement, may be barred by court order from calling its contest an "olympics", regardless of the group's intent, the

lack of confusion with USOC or the Olympics, and the subsidiary nature of any commercial transaction using "olympic" in which the group engages.

The Court of Appeals had no basis or need to create these severe potentials for infringement upon First and Fourteenth Amendment rights, in its interpretation of section 380. Indeed, it had a duty to avoid an interpretation of the statute yielding these unconstitutional results. That the Court of Appeals should have adopted a narrowing construction of section 380 if necessary in order to support and protect its constitutionality is a mandate of federal statutory interpretation often reiterated by this Court, as pointed out by Judge Kozinski in behalf of the dissenters in favor of en banc review below. Regional Rail Reorganization Act

Cases, 419 U.S. 102, 134-136 (1974); United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 571 (1973) (App.3) In holding that Congress meant to give USOC more than a trademark on "olympic", the Court of Appeals gave an interpretation of section 380 that was unnecessary to serve Congress' actual purpose of giving USOC a trademark. The interpretation instead gives USOC the power to control the nation's political vocabulary as to amateur athletics and as to "olympics", in blatant contradiction of the values of free speech and equal protection.

All of the statutory safeguards erected against USOC's (and ultimately against judicial) suppression of protected speech, in the guise of trademark enforcement, are knocked down by the Court of Appeals' interpretation

of section 380. A compelling reason to grant the writ in this case is to serve Congress' intent by respecting the terms of the statute it wrote, and to prevent the constitutional havoc that is wrought by the Court of Appeals' radical departure from that plain Congressional intent to bestow a trademark upon USOC.

II. TO HOLD AS THE COURT OF APPEALS DID THAT CONGRESS HAS THE POWER TO BESTOW CONTROL OF AN IMPORTANT PART OF LANGUAGE UPON AN ENTITY OF ITS CHOOSING CUTS A MENACING IF SMALL-SEEMING HOLE IN THE HEART OF THE CONSTITUTION.

In regulating trademarks by means of the Trademark Act of 1946 and other federal laws, Congress can be said to be regulating a form of speech. It is permitted to do so, relative to the First Amendment's guarantee of freedom of speech, by the principle that Congress may make laws that prohibit false

advertising, misleading commercial representations and other speech that endangers the consuming public. Friedman v. Rodgers, 440 U.S. 1, 9 (1979)(state may prohibit use of trade names by optometrists where a history exists of public deception and abuse by that means, in that "restrictions on false, deceptive, and misleading commercial speech" are permissible). Infringement of another's trademark, which consists in essence of using a word or symbol that has come to be identified with the owner in a context that is likely to confuse the public as to the origin of goods or services, constitutes a form of misleading commercial speech, which petitioners do not question the power of Congress to prohibit.

However, if the Court of Appeals were correct that Congress did intend to

bestow a "trademark-plus" upon USOC, entitling it to prohibit non-infringing uses that are at the edge of the stream of interstate commerce (if in it at all), that intent cannot be reconciled with First Amendment decisions of this Court as to free speech. There is a degree of protection to be afforded, even to unambiguously commercial speech. Virginia State Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976).

Petitioners propose that the trademark law doctrines that generic terms cannot be trademarked and that a party may use an incontestable trademark fairly to describe its goods or services have roots in the fundamental principle of freedom of speech that government does not own the language, and may not command persons to speak it in particular ways or

to convey certain meanings by it. [3]

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[3]The cases that establish that generic terms cannot be trademarked ring with awareness that to permit otherwise would diminish the value of human language and communication in favor of commercial exploitation. See, e.g., MBH Enterprises Inc. v. WOKY Inc., 633 F.2d 50, 53-55 (7th Cir. 1980)(where registered service mark on "I love you" was asserted, court refused to enforce it, stating, "[w]ords are not interchangeable; they are each unique. There is a limit to the ability to appropriate the language for exclusive commercial use"); Abercrombie & Fitch v. Hunting World Inc., 537 F.2d 4, 7 (2d.Cir. 1976)("safari" held to be generic and descriptive, and not subject to trademark protection); B&L Sales v. H. Daroff, 298 F.Supp. 908, 911 (S.D.N.Y. 1969), aff'd., 421 F.2d 352, 354 (2d Cir. 1969), cert. den., 398 U.S. 952 (1970)("[t]he owner of a registered mark 'may not appropriate to itself common English slang terms and thus prevent others from using such phrases in their descriptive sense"); Delaware & Hudson Canal Co. v. Clark, 80 U.S.(13 Wall., 311, 323 ("Nor can a generic name...be employed as a trademark and the exclusive use of it be entitled to legal protection"). The law that a generic mark may be cancelled at any time is based in the idea that "one competitor will not be permitted to impoverish the language of commerce" by depriving others of use of a generic term. Anti-Monopoly Inc. v. General Mills Fun Group, 611 F.2d 296 (9th Cir. 1979) and 684 F.2d 1316 (9th Cir. 1982), cert.den.; cf. Coca-Cola Co. v. Koke Co., 254 U.S. 143 (1920)(upholding Coca-Cola's mark on "Coke", and rejecting its claim of right

This principle is essential to any understanding of free speech. If government could give away control of words, for whatever good purposes, the national treasury of language and the First Amendment itself would be markedly diminished by each gift.

This Court has recognized the relationship between the trademark law principle that generic words cannot be trademarked and the important First Amendment-based idea that Congress cannot impoverish the language by withdrawing generic words from it. In Park 'N Fly v. Dollar Park 'N Fly, supra, 105 S.Ct. at 665, eight members of this Court agreed that there need be no fear that the Lanham Act "might take from the public domain language that is merely descriptive" because "[t]he Lanham Act allows a mark to be challenged at any

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to prevent competitors from using the word "dope", which "does not suggest

time if it becomes generic, and, under certain circumstances, permits the non-trademark use of descriptive terms contained in an incontestable trademark."

The Oxford English Dictionary (2-vol. ed. 1971) states that the first "Olympiad", consisting of ancient Greek athletic events by which the Greek calendar first was synchronized, occurred in 776 B.C., and the words "Olympic" and "Olympiad" date from that period in history. The O.E.D. defines "Olympic" both as an adjective and as a noun. As an adjective, "Olympic" is "1. of or belonging to Olympus; Olympian; celestial", and "2. of or belonging to Olympia in Elis...in which the most famous games of ancient Greece (the Olympic games) were celebrated in honour of the Olympian Zeus". As a noun,

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Coca-Cola by similarity" and as to which "there is no ground upon which the

"Olympic" means "[a]n Olympic game, usually in pl[ural]." The O.E.D. does not mention the 20th century International Olympic Games, but it does contain literary references to "Olympics" occurring at marketplaces, fairs, fish sales and (poetically) in Parliament throughout the past several centuries. The generic nature of this ancient classifying word "olympic" is obvious.

Petitioners assert that the doctrines that generic words may not be trademarked and that a party may use a trademarked term in good faith to describe its goods or services represent a balance between free speech and trademark regulation interests. Petitioners contend that these protections have a solid First Amendment core, protecting the national vocabulary against private ownership that would

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plaintiff can claim a personal right to exclude" other users).

otherwise be possible by trademarking generic words and enjoining fair uses in description. That First Amendment core is severely menaced by the Court of Appeals' opinion, holding that Congress can give away generic, idea-conveying words for good causes by bestowing "trademark-pluses" as to them upon chosen entities.

III. THE BLURRING OF THE DISTINCTION BETWEEN COMMERCIAL AND NON-COMMERCIAL SPEECH ACCOMPLISHED BY THE DECISION OF THE COURT OF APPEALS CREATES SIGNIFICANT CONFUSION AS TO THE SCOPE OF FIRST AMENDMENT PROTECTION TO BE AFFORDED TO NON-PROFIT CORPORATIONS AND OTHERS INCIDENTALLY ENGAGED IN COMMERCE AND PRIMARILY ENGAGED IN COMMUNICATIVE ACTIVITIES THAT ARE SUPPOSED TO BE FULLY PROTECTED BY THE FIRST AMENDMENT.

The Court of Appeals' opinion characterizes SFA&A's nonprofit and essentially ideological use of "olympic" as commercial speech. That characterization is grossly erroneous. According to the decisions of this Court,

"commercial speech" is that which "proposes a commercial transaction". Bolger v. Youngs Drug Products Corp., 103 S.Ct. 2875, 2879 (1983). The incidental monetary transactions occurring when "Gay Olympics I" sponsors used "olympic" on their posters and t-shirts, which were sold to raise money for their nonprofit corporate cause, do not fit within this Court's definition of commercial speech.

Speech containing a subsidiary commercial element is not thereby transformed into the less protected form, "commercial speech". Murdock v. Pennsylvania, 319 U.S. 105 (1943)("The mere fact that the religious literature is 'sold' by itinerant preacheres rather than 'donated' does not transform evangelism into a commercial enterprise."); New York Times v. Sullivan, 376 U.S. 254 (1964)(paid

advertisement does not lose its First Amendment protection, for its content of political and ideological speech, because of the subsidiary fact that the advertisement was paid for). Indeed, contributing money to political and public interest causes itself is a protected form of expression, see e.g., First National Bank v. Bellotti, 98 S.Ct. 1407 (1978); Buckley v. Valeo, 424 U.S. 1 (1976). These case precedents of this Court firmly establish that exercises of First Amendment free expression need not be "free" in the monetary sense to receive full protection under the First Amendment. To hold otherwise, as the Court of Appeals has done in the instant case, is to ignore the poignant contemporary reality that free speech often costs money, both to the speaker and the audience, whether for television

time to air a message, for a seat in the auditorium where "Hair" is being shown, or for some property (a t-shirt, a button, a book) that contains and symbolizes the message being conveyed.

IV. THE HOLDING THAT USOC IS NOT ENGAGED IN STATE ACTION CONFLICTS WITH ANOTHER NINTH CIRCUIT DECISION AS TO USOC, AS WELL AS ABANDONING THE DECISIONS OF THIS COURT THAT ARE SUPPOSED TO GOVERN WHAT STATE ACTION IS AND HOW COURTS ARE TO DETECT ITS PRESENCE.

The analytical process supposedly required to determine "state action", Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), was bypassed in the case at bar. The trial court glossed over the disputed issue of fact as to USOC's state action and granted it summary judgment. (App.4,6) The Court of Appeals hurriedly leaped the "state action" hurdle in its determination to avoid the "difficult issue of

applicability of equal protection guarantees" and to avoid determining if USOC discriminated. (App.1) Thus, USOC, an entity created and chartered by Congress, given powers to perform an array of public functions relative to amateur athletics throughout the nation and relative to U.S. participation in the Olympic Games, and given public resources including sizeable sums of money and an unprecedented "trademark" upon a generic term, was held not to be engaged in "state action". 36 U.S.C.secs. 371 et seq. (Dkt.58, establishing that the federal government gave USOC at least $16,300,000. from 1980 forward to perform public functions). The "state action" tests developed by this Court, giving a prominent place to each of the factors present in this case---public money, governmental functions, establishment by

government--- appear to have been cast aside at bar. Burton, supra; Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Evans v. Newton, 382 U.S. 296,299 (1966); Marsh v. Alabama, 326 U.S. 501 (1946).

The Court of Appeals' holding as to the absence of state action also squarely conflicts with its contrary holding that USOC was engaged in "state action", in its participation in staging of the International Olympic Games at Los Angeles. Martin v. IOC, 740 F.2d 670, 677 (9th Cir. 1984).

The issue of state action especially deserves more consistent and sensitive handling than afforded at bar where the entity is challenged as a purported state actor engaged in what the challenger claims to be invidious discrimination. Cf. Martin v. IOC, supra; Fortin v. Darlington Little League, 514 F.2d 344,

347-348 (1st Cir. 1975). (Little League, chartered by Congress, was held to be engaged in state action when it used public resources to provide softball games for boys only). USOC's openly discriminatory selection of the Special, Junior and Explorer Olympics for its blessing, and its tacit permission to dozens of other Olympics including an International Police Olympics, combined with its total suppression of use of "Olympics" by gay persons for their discrete public interest purposes, would constitute a blatant case of invidious discrimination in violation of the equal protection guarantee, if USOC were held to be doing state action. Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 95-99 (1972); City of Oklahoma City School Board v. National Gay Task Force, 729 F.2d 1270

(10th Cir. 1984), aff'd. by equally divided court, 53 U.S.L.W. 4408 (1984). Organization for A Better Austin v. O'Keefe, 402 U.S. 415, 416-419 (1971); Saia v. New York, 334 U.S. 558, 560-561 (1948)(where the "right to be heard is placed in the uncontrolled discretion of the Chief of Police", city ordinance invoked to prohibit Jehovah's Witnesses from using loudspeakers established an unconstitutional prior restraint).

Surely if loudspeakers and leaflets and public places for speech are "indispensable instruments of effective public speech", Saia, supra, 334 U.S. at 561, words themselves are at least as vital. Where, as in the case at bar, an entity empowered by Congress to control use of a word does so in a discriminatory and speech-suppressing fashion, it seems necessary to the integrity of the state

action concept itself to look far more carefully to determine whether it is the hand of government that is falling over the mouthes of those being enjoined from speaking. After all, the state action concept is the gateway to protection under the Bill of Rights; that gateway should not be casually blocked by the sort of incautious state action precedent that the Court of Appeals has made at bar.

V. THE INJUNCTION AT BAR CONSTITUTES A PRIOR RESTRAINT THAT IS IRRECONCILABLE WITH THE FIRST AMENDMENT DECISIONS OF THIS COURT, INCLUDING ITS COMMERCIAL SPEECH DECISIONS.

The injunction granted in this case and upheld on appeal prohibits SFA&A, Dr. Waddell and all persons associated with them from using "Olympic" in virtually any context.(App.6) If petitioners are correct that their uses of "Olympic" constitute ideological speech deserving

the fullest protection under the First Amendment, the injunction against those uses constitutes a classic prior restraint, prohibiting particular speech based solely upon its content.[4] USOC in this case has failed to meet anything resembling the "burden" that "must rest on the censor", Southeastern Promotions, supra. Oppositely, based on a conclusory and factually unsupported assertion of trademark infringement, USOC has accomplished absolute and prohibitory

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4 Even where asserted interests that are arguably far stronger than USOC's interest in raising money for U.S. participation in the Olympics have been presented in support of prior restraints, they have not satisfied this Court. See, e.g., New York Times v. United States, 403 U.S. 713, 714 (1971) (national security); Hynes v. Mayor, 425 U.S. 610 (1976)(privacy and peace in the home); Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 553 (1975)(obscenity); Carroll v. Princess Anne, 393 U.S. 175, 183 (1968)(public safety); Spence v. Washington, 418 U.S. 405 (1974)(sanctity of the U.S. flag); Near v. Minnesota, 283 U.S. 697(1931)(public nuisance).

governmental involvement, by way of a judicially ordered injunction, in what petitioners contend is nothing less than political, symbolic and ideological speech.

Even if petitioners' use of "olympic" could properly be deemed commercial speech, the evidence to the contrary notwithstanding, the Court of Appeals failed to follow controlling precedents requiring balancing of interests in commercial speech cases. It is true that a court may act to protect the private holder of a property right against invasion of that property right by a "speaker". Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 563 (1977)(First Amendment held not to permit news broadcaster to show "entire act" of petitioner human cannonball

without compensating him, where petitioner "does not seek to enjoin the broadcast of his performance".)). The power of a court to protect a trademark, of course, also includes the power to enjoin infringing uses in proper cases. Park 'N Fly v. Dollar Park 'N Fly, supra, 105 S.Ct. at 667; Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206-207 (2d Cir. 1979); 15 U.S.C.sec. 1116.

Nevertheless, even where commercial speech is concerned, any injunctive relief is supposed to be tailored to avoid suppression of protected speech. Matter of R.M.J., 102 S.Ct. 929, 937-939 (1982); Consumers Union of United States v. General Signal Corp., 724 F.2d 1044 (2d Cir. 1983); Better Business Bureau v. Medical Directors, 681 F.2d 397 (5th Cir. 1982). In the case presented here,

petitioners have offered to place the disclaimer "not associated with the United States Olympic Committee or any Olympic activity" on all of their properties and paraphernalia alongside the word "Olympic". Assuming arguendo that SFA&A's use possibly could be held commercial and trademark-infringing speech, this disclaimer would have struck the correct balance of speech and regulatory interests, especially where no proof of confusion was adduced and no harm to USOC ever was proved. No basis for the injunction prohibiting petitioners from essentially any use of "Olympic", and thus foreclosing this balanced approach to solving the problem, has been presented in this case.

In upholding the speech-suppressing injunction at bar, the Court of Appeals ignored the clear precedents of this

Court requiring that where disclaimers suffice to accomplish the governmental purpose of preventing misleading or deceptive speech, and especially where there are competing interests in permitting some speech, injunctions violate First Amendment guarantees. This precedent of the Court of Appeals promises to spawn other similarly unconstitutional injunctions, absent review by this Court. The position of this Court that injunctive relief should not be ordered where less intrusive relief suffices, Doe v. Bolton, 410 U.S. 179, 200 (1973), must be vindicated here, especially if petitioners are correct that the injunction restrains speech and enforces an apparent discrimination.

VI. IF THE AMATEUR SPORTS ACT BESTOWED NOTHING MORE OR LESS THAN AN INCONTESTABLE TRADEMARK AS TO "OLYMPIC" UPON USOC, THEN THAT INTERPRETATION SHOULD BE HARMONIZED WITH THE LANHAM ACT.

If petitioners are correct that Congress intended to bestow, and at most had constitutional authority to bestow, a trademark as to "olympic" upon USOC, then the Court of Appeals' decision cannot be squared with the obligation of the federal judiciary to render statutory interpretations that harmonize the provisions of pre-existing statutes wherever feasible. The Court of Appeals' determinations that USOC need not prove that SFA&A's use of "olympic" tended to cause confusion, 36 U.S.Code section 380(a)(4), and that SFA&A could not use "olympic" fairly to describe its planned activities, despite 15 U.S.Code section 1115(b)(4), wholly contradict principles

that have been refined over decades of Lanham Act litigation.

Under the Lanham Act, likelihood of confusion, the exception for fair use in description, the non-trademarking intent of the user, and the wilfulness of any asserted infringement for purposes of awards of attorneys fees are questions of fact. Petitioners assert that there is no statutory reason under section 380 of the Amateur Sports Act to subvert the litigative process of factual inquiry normally associated with these issues, where USOC claims trademark infringement as to uses of "olympic". USOC has had no trouble enforcing its trademark as to "olympic" against commercial infringers. USOC v. Intelicense Corp., 737 F.2d 263, 267 (2d Cir. 1984), cert.denied; USOC v. Union Sports Apparel, 220 U.S.P.Q. 526 (E.D.Va. 1983).

As argued above, the free speech interests that are embedded in the generic terms and fair use doctrines of trademark law make it all the more appropriate that parties accused of infringing "olympic", such as petitioners, be accorded a meaningful day in court, so that free speech interests and trademark interests are properly balanced in accordance with the will of Congress. Accordingly, petitioners contend that an additional and important reason for this Court to take review of this case is to render an interpretation of the Amateur Sports Act of 1978 that conforms to trademark law requirements developed in decades of litigation under the Lanham Act, including the requirement that attorneys' fees shall only be awarded in an exceptional case, where the infringement is wilful, deliberate,

fraudulent or malicious and where equity supports the award.

VII. CONCLUSION

In its decision at bar, the Court of Appeals failed to follow basic constitutional and trademark law principles. In that failure, the Court of Appeals' opinion creates a monster, casting a long and chilly shadow over the relationship between trademarks and the Constitution, and provoking free speech and equal protection problems in a vital part of the relationship between people and government. Every author, speaker, artist and non-profit organizer is negatively affected by the Court of Appeals' decision, which conflicts so openly and unnecessarily with the rules of federal statutory interpretation, with precedents defining the boundaries upon

commercial and ideological speech and with trademark principles.

A holding by the Court of Appeals that section 380 grants a trademark only, and that its application to any alleged trademark infringer must be reconciled with the Lanham Act, would have fully served Congress' legitimate and permissible purpose of giving USOC a means of raising funds by bestowing a trademark upon it. Instead the Court of Appeals has gone to the distant extreme, in both trademark and constitutional law terms, of holding that Congress had the intent and authority to bestow almost absolute control in both commercial and ideological speech realms of a generic and widely popular term upon a Congressionally chartered entity, to do with as it pleases while calling its power a "trademark", that is subject to

no trademark law burdens of proof or defenses. It must also be noted in this regard that the entity Congress empowered, USOC, has been granted a monopoly in governance of amateur athletics in the same Act. 36 U.S.Code sections 371 et seq. This fact intensifies the harm done by the Court of Appeals' decision.

The interpretation of 36 U.S.Code section 380 rendered by the Court of Appeals raises surpassingly crucial questions as to the boundaries of Congressional power relative to both trademarks and the Bill of Rights, and creates major conflicts with case precedents that should have defined those boundaries. The fundamentally important issues of the relationship of those trademark principles to the Constitution, as well as the questions of state action,

invidious discrimination and the propriety of injunctive relief that are raised by the Court of Appeals' opinion, merit review by this Court.

DATED: August 15, 1986

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE a corporation organized and existing under the laws of the United States of America,	82-4467 D.C.# C-82-4183-RFP OPINION
Plaintiffs-Cross-Defendants-Appellees	
vs.	
SAN FRANCISCO ARTS & ATHLETICS, and Thomas P. Waddell,	
Defendants-Cross-Appellants-Cross-Plaintiffs.	

Argued and Submitted
June 11, 1985.
Decided Jan. 27, 1986.

Before GOODWIN and WALLACE, Circuit Judges, and STEPHENS, District Judge.*

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* The Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

GOODWIN, Circuit Judge.

This case arises out of the San Francisco Arts and Athletics' (SFAA) use of the phrase "Gay Olympics" to describe an athletic competition it sponsored. The United States Olympic Committee (USOC) and the International Olympic Committee (IOC) brought suit under the Amateur Sports Act of 1978, codified at 36 U.S.C. §§371-96 (1982), against SFAA and various individuals to restrain the use of "Olympics" to describe the event. Plaintiffs also made various related claims, which were not subsequently pressed, and are no longer in the case. The district court issued a temporary restraining order and then a preliminary injunction, which was affirmed by this court. After further proceedings in the district court, summary judgment and a permanent in-

junction were awarded to USOC and IOC. Defendants appealed from the judgment and injunction and an award of attorneys' fees. The appeals were consolidated and are now before us. We affirm the summary judgment and injunction, but reverse and remand the award of attorneys' fees.

I. The Amateur Sports Act Claim

A. The Act

The Amateur Sports Act of 1978 confers a corporate charter on USOC and gives that body certain rights in the word "Olympics" and related symbols. The act provides:

> (a) Without the consent of [USOC], any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition --
>
> . . . .

> (4) the words "Olympic," "olympiad," "Citius Altius Fortius," or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with [USOC] or any Olympic activity;
>
> shall be subject to suit in a civil action by the [USOC] for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946)....

36 U.S.C. §380(a)(4)(1982).

It is uncontested that SFAA used "Olympic" in the promotion of its games. This use involved not only the advertising of the games, but the selling of products with the word "Olympic" on them. Because confusion between USOC's use and SFAA's use was a disputed question of fact, the summary judgment can be sustained only if the Act does not require confusion.

SFAA argues that §380(a)(4) can only be read as requiring confusion between uses because the "tending to cause confusion" language must be applied to the whole clause. USOC argues that confusion is an element of a claim under the clause only where a simulation is used rather than the proscribed words and symbols.

The difficulty with SFAA's argument is that when §380 was adopted, it replaced a provision prohibiting the use of the protected words or any combination of them. See 36 U.S.C. §379 (1974)(amended 1978). Section 380 was intended to make the civil remedies of the Trademark Act of 1946 available to USOC and to give USOC the exclusive right to market licenses for use of the protected words and symbols. See H.R. Rep. No. 1627, 95th Cong., 2d Sess.

1978, 8-10, 15, 37, reprinted in 1978 U.S. Code Cong. & Ad.News 7478-95. See also United States Olympic Committee v. Intelicense Corp., 737 F.2d 263, 266-67 (2d Cir.), cert. denied, --- U.S. ---, 105 S.Ct. 387, 83 L.Ed.2d 321 (1984)(false association with the USOC not required); United States Olympic Committee v. International Federation of Bodybuilders, 219 U.S.P.Q. 353, 361 (D.D.C.1982)(likelihood of confusion that goods or services stem from USOC not required). Other courts have remarked on the need to insure the market value of licenses for the use of Olympic symbols. See Stop the Olympic Prison v. United States Olympic Committee, 489 F.Supp. 1112, 1120 (S.D.N.Y. 1980). In view of the pre-existing criminal sanction that prohibited non-confusing uses and the intent to broad-

en USOC's protection and to ensure its power to license the symbols and words, we conclude that confusion is unnecessary.

SFAA also raises various Lanham Act defenses. When Congress adopted the Amateur Sports Act, it provided that Lanham Act remedies would be available to USOC. It omitted any provision for Lanham Act defenses. In light of the purpose of the Act, which gives the USOC more power than any ordinary trademark holder by allowing it to prohibit non-confusing uses, and the express inclusion of Lanham Act defenses in a similar statute, see The Trademark Counterfeiting Act of 1984, Pub.L. No. 98-473, §1502(a), 98 Stat. 1837, 2178-79, codified at 18 U.S.C.A. §2320(c) & (d)(1)(B)(West.Supp.1985), we conclude Congress' omission was

intentional. As a result, the Lanham Act defenses raised are irrelevant.

B. Application

SFAA claims that even if the statute was intended to bar the use of the word "Olympics" notwithstanding a confusing effect, the application of the statute to SFAA is unconstitutional.

SFAA's first argument is based on the equal protection component of the Fifth Amendment due process clause. It argues that USOC has discriminated between homosexual groups and others in determining against whom to enforce its rights in "Olympic." It cites numerous other competitive games advertised as "Olympics" which have gone unchallenged by USOC. USOC denies discrimination and adduces other litigation by it, albeit begun after SFAA made a claim of discrimination in the instant case.

We need not resolve the difficult issue of the applicability of equal protection guarantees or determine whether USOC discriminated because we find the absence of governmental involvement in the alleged discrimination dispositive. SFAA argues that the judicial enforcement of the Olympic Committee's rights constitutes sufficient involvement, citing Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). However, in the absence of special benefit flowing to the state from the challenged action, see Burton v. Wilmington Parking Authority, 365 U.S. 715, 724, 81 S.Ct. 856, 861, 6 L.Ed.2d 45 (1961), state action will not be found unless there was a governmental decision to violate rights. Therefore, state enforcement of private rights generally will not

itself meet the state action requirement. See Cobb v. Georgia Power Co., 757 F.2d 1248, 1251 (11th Cir.1985). That the United States conferred special property rights in USOC's trademarks does not make USOC's exploitation of those rights state action. Many property rights, such as ordinary trademarks and copyrights, see, e.g., Walt Disney Productions v. Air Pirates, 345 F.Supp. 108, 115-16 (N.D.Cal.1972), aff'd in relevant part, 581 F.2d 751, 758-59 (9th Cir.1978), cert. denied, 439 U.S. 1132, 99 S.Ct. 1054, 59 L.Ed.2d 94 (1979) or the right to exclude, see Hudgens v. NLRB, 424 U.S. 507, 512-21, 96 S.Ct. 1029, 1032-37, 47 L.Ed.2d 196 (1976), can be enforced to limit protected speech without violating the Constitution because there is no state action. While SFAA's claims

that the government financed USOC and jointly marketed Olympic medals with it are more persuasive, Rendell-Baker v. Kohn, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), makes clear that neither financing nor contractual relationships by themselves suffice to make a private entity a governmental actor. Id. at 840-41, 102 S.Ct. at 2770-71.

SFAA also appears to argue that by barring non-confusing speech, the Act violates the rights of commercial speech under the First Amendment. See Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 563-64, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980). Ordinary trademark actions are based on a finding of confusion of products, and hence of misleading speech, and SFAA claims this

limit is constitutionally imposed. However, the word "Olympic" and its associated symbols and slogans are essentially property. Such property rights can be protected without violating the First Amendment. See Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573-77, 97 S.Ct. 2849, 2856-58, 53 L.Ed.2d 965 (1977)(property rights in performance of human cannonball act may properly receive priority over First Amendment rights of broadcaster), Hudgens v. NLRB, 424 U.S. 507, 518-21, 96 S.Ct. 1029, 1035-37, 47 L.Ed.2d 196 (1976)(state private property rights defeat claim to speak freely on the property of another). The Supreme Court has approved the decisions of federal trial courts upholding the exclusive right to use literary works against First Amendment chal-

lenge. See Sacchini, 433 U.S. at 576-77 & 577 n. 13, 97 S.Ct. at 2857-58 & 2858 n. 13. Because SFAA had satisfactory alternative means for expressing its opposition to the Olympics, it has no First Amendment right to use "Olympics" or the Olympic symbols to promote its games or products.

C. Relief Awarded

The district judge granted USOC a permanent injunction against SFAA's use of the name. SFAA argues that declaratory relief or a narrower injunction would be more appropriate. It is undisputed that the SFAA resumed use of the Olympics trademark without disclosure to the Olympic Committee. While the scope of an injunction is initially left to the discretion of the trial court, see SEC v. Arthur Young & Co., 590 F.2d 785, 787 (9th Cir.1979),

the court must apply the rule that injunctions are not awarded if any lesser relief will protect the trademark holder. See AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 354 (9th Cir.1979). While review of a preliminary injunction is relatively deferential, review of a permanent injunction is stricter because the parties have had a change to present their arguments, making error easier to discern. See Sports Form, Inc. v. UPI, 686 F.2d 750, 752 (9th Cir.1982); Miss Universe, Inc. v. Flesher, 605 F.2d 1130, 1133 (9th Cir.1979). Abuse of discretion occurs if the district court rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions. See Sports Form, 686 F.2d at 752; Miss Universe, 607 F.2d at 1133-34. In this

case the facts are undisputed and the district court correctly stated the applicable law. Furthermore, while a declaratory judgment might have sufficed, providing injunctive relief was not, given SFAA's past use of the protected words and symbols, an abuse of discretion. The injunction merely tracks the statute, and so is not overbroad.

The district court also awarded the plaintiffs attorneys' fees under the Amateur Sports Act. Violation of the Act subjects the violator "to suit in a civil action by [USOC] for the remedies provided in the Trademark Act." 36 U.S.C. §380(a)(1982). USOC contended in the district court that the reference to the Lanham Act remedies was intended as a shorthand for an earlier provision providing for an

award of attorneys' fees in the court's discretion. The district court found it unnecessary to resolve the question, deciding that the defendants' actions satisfied the stricter requirement of the Lanham Act. On appeal, USOC argues that the defendants' conduct fits within the requirements of the Lanham Act. Cf. United States Olympic Committee v. Union Sport Apparel, 220 U.S. P.Q. 526, 529 (E.D.Va. 1983)(using Lanham Act standards). Therefore, we must discuss the applicability of the

Lanham Act to the defendants' conduct.[1]

The last sentence of 15 U.S.C. §1117 (1982) provides, "The court in exceptional circumstances may award reasonable attorneys' fees to the prevailing party." The "may" has been generally considered as making the award discretionary even if it fits within the statutory standard of an exceptional circumstance. See Transgo,

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[1] In a footnote in its brief, USOC refers to an argument that the trial court has discretion under the Amateur Sports Act to award fees without first making a finding of "exceptional circumstances." Because this case has been briefed and argued on the theory that there were (or were not) exceptional circumstances, we take the briefs as submitted and limit our review to the issues set forth in the briefs as required by Fed.R.App.P. 28(a)(2). See 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure §3974 (1977). But see International Union of Bricklayers & Allied Craftsmen Local Union No. 20 v. Martin Jaska, Inc., 752 F.2d 1401, 1404 n. 4 (9th Cir.1985).

Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1014 (9th Cir.1985); Sealy, Inc. v. Easy Living, Inc., 743 F.2d 1378, 1384 (9th Cir.1984); Jellibeans, Inc. v. Skating Clubs of Georgia, Inc., 716 F.2d 833, 846-47 (11th Cir.1983).

The statute itself contains no definition of what constitutes "exceptional circumstances." The Senate Report says that exceptional circumstances include conduct that is "'malicious,' 'fraudulent,' 'deliberate,' or 'wilful.'" S.Rep. No. 1400, 93d Cong., 2d Sess. 2, reprinted in 1974 U.S. Code Cong. & Ad.News 7132, 7133. This circuit has adopted this standard. See Sealy, Inc. v. Easy Living, Inc., 743 F.2d at 1384, Playboy Enterprises v. Baccarat Clothing Co., Inc., 692 F.2d 1272, 1276 (9th Cir.1982).

The trial court awarded attorneys' fees on the theory that the SFAA intentionally used the word "Olympic" in a manner that violated the statute and knew there was a risk the statute would be violated. The court rejected SFAA's claim that the "quality of the defense" that SFAA interposed to the action was relevant to a determination of its willfulness.

We believe that the rule defining willful infringement in patent cases is instructive. Cases construing willful infringement in patent areas apply the rule that one "who reasonably doubted that the patent was valid has not willfully infringed." Lam, Inc. v. Johns-Manville Corp., 668 F.2d 462, 474 (10th Cir.), cert. denied, 456 U.S. 1007, 102 S.Ct. 2298, 73 L.Ed.2d 1302 (1982). Cf. United States Olympic

Committee v. Union Sport Apparel, 220 U.S.P.Q. at 529 (attorneys' fees particularly appropriate where "expenses were caused by a recalcitrant defendant without a substantial defense"). A rule awarding fees similar to that adopted in patent cases accords with Congress' intention to eliminate the disparity in patent and trademark cases by amending the Lanham Act to provide for fees. See S.Rep. No. 1400, 93d Cong. 2d Sess. 2, reprinted in 1974 U.S.Code Cong. & Ad.News 7132, 7133. See also 35 U.S.C. §285 (1982)("exceptional cases" test for patent cases).

Given statements in the only prior case, Stop the Olympic Prison v. United States Olympic Committee, 489 F.Supp. 1112 (S.D.N.Y.1980), SFAA might have reasonably thought that its proposed usage was not barred by the statute.

Its claims of discrimination by the USOC might be found to be reasonable, considering the proliferation of other groups using the restricted words. While the USOC was not sufficiently identified with the federal government to subject the Committee to the equal protection component of Fifth Amendment due process, the argument that there was state action might not be considered insubstantial. These issues should be considered by the district court in the first instance.

Local Rule 270 of the Northern District of California requires that the parties discuss disputed issues relating to attorneys' fees and requires the movant to file declarations detailing the amount of time spent and the qualifications of counsel. SFAA argues that plaintiffs' beach of this

rule bars them from claiming fees. However, SFAA's representatives refused to meet with plaintiffs for the purpose of supplying the information required by the local rule, apparently because they feared that this would compromise SFAA's position that no attorneys' fees should be awarded. Under the circumstances, we regard the district court's rulings as an implicit finding that there had been a waiver of the local rule. In light of subsequent affidavits providing further information, the district court's ruling is not clearly erroneous, and must be accepted.

We remand for further proceedings to determine whether the defendants' conduct was sufficiently exceptional under the Sealy case to make an award of attorneys' fees justifiable. Although the issue was briefed and ar-

gued, we express no opinion on the amount of the award.

The standard for allowing fees is provided by Kerr v. Screen Extra's Guild, Inc., 526 F.2d 67, 70 (9th Cir.1975), cert. denied, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976). When the record does not permit adequate review because there is no showing that the time actually spent was reasonably necessary, the district court has no reviewable basis for finding that the awards were reasonable and necessary. As the Sealy court noted, "[t]hough the fee actually charged to the client may be an important factor, 'whether or not [the client] agreed to pay a fee and in what amount is not decisive.... The criterion for the court is not what the parties agreed but what is reasonable.'"

743 F.2d at 1385 (alterations and ellipsis in original; citations omitted).

On remand, the trial court should determine how much of the work was reasonably necessary. Most of the counts advanced by plaintiffs appear to have been ignored after the initial pleading. Plaintiffs' primary argument in its motion for attorneys' fees has been abandoned on appeal. If, after a Kerr and Sealy hearing, fees are to be awarded, the court should examine both the reasonableness and necessity for the rather impressive amount of time accumulated on this case.

The injunction is affirmed with costs. The fee award is vacated and remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America,	)	Nos. 84-1759 and 84-2528
	)	D.C. No. C82-4183 JPV
	)	ORDER
Plaintiffs-Cross-Defendants-Appellees,	)	
vs.	)	
SAN FRANCISCO ARTS & ATHLETICS, and Thomas P. Waddell,	)	
Defendants-Cross-Plaintiffs-Appellants.	)	

Filed January 27, 1986

BEFORE: GOODWIN and WALLACE, Circuit Judges, and STEPHENS, District Judge*

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* The Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

Upon petition for rehearing and suggestion for rehearing en banc, the panel has voted to amend its opinion entered herein January 27, 1986, as follows:

On page 6, end of line 11 of the typewritten opinion (page 8, line 2, of the printed slip opinion), insert footnote marker 1/ and the following text:

> SFAA contends that our finding of no state action conflicts with Martin v. International Olympic Committee, 740 F.2d 670, 677 (9th Cir. 1984). We disagree. The determination whether state action exists is entirely dependent on the unique facts of each case. Burton v. Wilmington Parking Authority, 365 U.S. 715 726 (1961). In Martin, the government involvement was significantly more extensive than that found in this case.

On page 8 of the typescript opinion (page 9 of the printed slip opinion), renumber the footnote to 2/.

The full court was advised of the suggestion for rehearing en banc. An active judge called for a vote on whether to rehear the matter en banc. The request for en banc consideration failed to receive a favorable majority of the votes of the active judges.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America,	)	84-1759 84-2528 DISSENT
Plaintiffs-Cross-Defendants-Appellees,	)	
vs.	)	
SAN FRANCISCO ARTS & ATHLETICS, and Thomas P. Waddell,	)	
Defendants-Cross-Plaintiffs-Appellants.	)	

Filed May 28, 1986

KOZINSKI, Circuit Judge, with whom Circuit Judges PREGERSON and NORRIS join, Dissenting.

I.

This case was brought by the United States Olympic Committee (USOC) and others under the Amateur Sports Act of 1978 (the Amateur Act), 36 U.S.C. §§371-396 (1982), to enjoin the use of the word "Olympic" by appellants, San Francisco Arts & Athletics (SFAA) in connection with an event to be known as the Gay Olympic Games. USOC is a private nonprofit corporation chartered by Congress, 36 U.S.C. §§371, 377 (1982); SFAA is a nonprofit corporation. The Gay Olympic Games SFAA intended to sponsor in 1982 (and again in 1986), were "designed to combat homophobia and to work for the health and tolerance of gay and lesbian persons." Pet. Reh. 2.

A panel of this court upheld a permanent injunction issued after summary judgment had been granted to

USOC. International Olympic Committee v. San Francisco Arts & Athletics, 781 F.2d 733 (9th Cir. 1986). For the reasons stated below, I find the panel's reasoning squarely at odds with controlling Supreme Court authority. Moreover, the result reached threatens a potentially serious and widespread infringement of personal liberties. I therefore would vacate the panel's opinion and set the case for rehearing en banc.

A. As the panel interprets the Amateur Act, the USOC is given the exclusive right to use the word Olympic "for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition," 36 U.S.C. §380, whether undertaken for profit or for a nonprofit purpose. The

USOC may obtain an injunction against use of this term without showing likelihood of confusion and without overcoming the defenses normally available in trademark infringement actions under the Lanham Act. 781 F.2d at 736.

Interpreted in this fashion, the Amateur Act represents a sweeping exercise of sovereign power, implicating by principles of individual liberty protected by our Constitution. By passing the Act, Congress extracted a word from the English language and gave it to a private party to use in connection with any commercial endeavor or public event. This raises serious first amendment concerns that the panel failed to address or acknowledge.

By word Olympic has a meaning unique within our language. It connotes open and intense competition among non-

professional athletes, usually involving the best and most accomplished contestants. Thus, we have Special Olympics, Junior Olympics, Police Olympics, even Canine Olympics, normally involving competition among the best and finest within the denoted category. I have great difficulty with the idea that Congress can deny all of us that word, and the ideas it embodies, in connection with all public endeavors. As noted by Justice Harlan in Cohen v. California, 403 U.S. 15, 26 (1971), "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." The ideas embodied in the word Olympic can, of course, be expressed by other means, but only in a much clumsier fashion, without the same

nuance of meaning. As Justice Harlan wrote in Cohen,

> much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Id. at 26.

In organizing the Gay Olympic Games, the SFAA sought to "'creat[e] a more realistic image of homosexual men and women in all societies' and to 'provid[e] more alternatives for homosexual men and women to move into the mainstreams of their respective.'"

International Olympic Committee v. San Francisco Arts & Athletics, 219 U.S. P.Q. 982, 985 (N.D.Cal.1982), aff'd mem., 707 F.2d 517 (9th Cir. 1983). The word Olympic was no doubt chosen to foster a wholesome, normal image of homosexuals. Denying SFAA use of the word thwarts that purpose. To say that the SFAA could have named its event "The Best and Most Accomplished Amateur Gay Athletes Competition" no more answers the first amendment concerns here than to suggest that Paul Robert Cohen could have worn a jacket saying "I Strongly Resent the Draft."

The Supreme Court has been extremely reluctant to approve restrictions against the use of particular words. See Cohen v. California, 403 U.S. 15 (1971); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85

(1977)(striking down a prohibition against posting "For Sale" and "Sold" signs on residential lawns). In the rare case when the Court has done so, it was only after the closest scrutiny and subject to the most careful restrictions. See, e.g., FCC v. Pacifica Foundation, 438 U.S. 726, 744-51 (1978) (FCC ban of patently offensive language justified because of special concerns pertaining to broadcasting). By contrast, the panel here dismisses SFAA's constitutional argument, simply by noting that "the word 'Olympic' and its associated symbols and slogans are essentially property. Such property rights can be protected without violating the First Amendment." 781 F.2d at 737 (citing Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573-77 (1977); Hudgens v. NLRB, 424 U.S. 507, 518-21 (1976)). 35.

To say that the word Olympic is property begs the question. What appellants challenge is the power of Congress to privatize the word Olympic, rendering its unutterable by anyone else in connection with any product or public event, whether for profit or, as in this case, to promote a cause.

The rights conferred on the USOC by the Amateur Act are materially different from traditional intellectual property rights where a careful balance is struck between the interests of the property owner and those of the public. Trademarks,[1] copyrights,[2] and patents[3] are subject to a variety of statutory and common law defenses, and they reserve only those rights necessary to protect the owner's economic interests. Zacchini, upon which the panel relied, is instructive. The Court there was

careful to limit the relief afford petitioner (the human cannonball) to assuring that he "reap[s] the reward of his endeavors." 433 U.S. at 573. The Court twice noted that "[p]etitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it." Id. at 578; see id. at 573-74.

By and large, rights in intellectual property are limited to uses that have been invented, created or developed by the owner. They are not a wholesale prohibition against all public uses but provide limited protection for that which "is the product of [the owner's] own talents and energy, the end result of much time, effort, and expense." Zacchini, 433 U.S. at 575. See Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S.Ct. 2218,

2223 (1985). So limited, rights in intellectual property are easily harmonized with the first amendment. See id. at 2228-31; Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977)(copyright); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2d Cir. 1979)(trademark); J. Gilson, Trademark Protection and Practice, §5.09[5](1985); Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA L.Rev. 1180 (1970).

However, when cut loose from their conceptual moorings, intellectual property rights can raise serious constitutional concerns. Here, the Act's ironclad prohibition against every commercial or theatrical use of the word Olympic (unrestrained by the

need to show likelihood of confusion or to overcome Lanham Act defenses) stakes out an intellectual property fiefdom quite unlike anything we have seen in our law before.[4] By giving the USOC exclusive possession of the word, Congress has diminished the rights of everyone else, withdrawing from the public domain a term used by many and useful to more. If Congress has the power to grant a crown monopoly in the word Olympic, one wonders how many other words or concepts can be similarly enclosed, and the extent to which our public disclosure can thereby be impoverished. See Cohen v. California, 403 U.S. at 26.

B. My first amendment concerns are heightened by the way the USOC allegedly exercises its stewardship over the word Olympic. According to

the petition for rehearing "[t]he facts submitted below establish that USOC has openly permitted use of 'Olympic' both by groups that it directly supports, e.g. the Special Olympics, the Explorer Olympics and the Junior Olympics, and by groups that it has known to be using 'Olympic' and that it has elected not to sue, such as the 'International Police Olympics.'" Pet. Reh. 10.

Accepting SFAA's allegation, as we must, it seems that the USOC is using its control over the term Olympic to promote the very image of homosexuals that the SFAA seeks to combat: handicapped, juniors, police, Explorers, even dogs are allowed to carry the Olympic torch, but homosexuals are not. Troublesome as would be a total withdrawal of the term from public discourse, an exclusion that is invoked

pursuant to a subjective assessment of the wholesomeness of the proposed speaker or propriety of the proposed message is more troublesome still. See Police Department of Chicago v. Mosley, 408 U.S. 92, 99-102 (1972); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948). Where the entity making the decision is private, unconstrained by principles of equal protection and due process, and entirely free of the discipline imposed by our political system, there are no safeguards whatsoever against arbitrary exclusion of certain groups because they wish to communicate ideas some may find offensive.[5] Under the panel's rationale the result would have been the same if appellants were blacks rather than homosexuals, and their claim were based on racism rather than homophobia.

II.

A. Once it is concluded that the first amendment is implicated by giving USOC the word Olympic, the next inquiry must be whether doing so directly advances a substantial governmental interest. Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 564, 566 (1980). If the Amateur Act prohibited only those uses likely to cause confusion or otherwise mislead the public, it would in all likelihood survive first amendment challenge. See Friedman v. Rogers, 440 U.S. 1, 13-15 (1979). However, the panel reads the Act as proscribing all unauthorized uses of the word Olympic, regardless of whether they would mislead the public, undermine USOC sponsored events or cause anyone any harm

whatsoever. The first amendment requires, at minimum, close scrutiny of the governmental interest served by such a broad prohibition.

Because the case was dismissed short of trial, we can only speculate as to what governmental interest is advanced by giving USOC such sweeping rights in the word Olympic. As the panel noted, however, "[o]ther courts have remarked on the need to insure the market value of licenses for the use of Olympic symbols." 781 F.2d at 736 (citing Stop the Olympic Prison v. United States Olympic Committee, 489 F.Supp. 1112, 1120 (S.D.N.Y. 1980)). See also International Olympic Committee v. San Francisco Arts & Athletics, 219 U.S. P.Q. 982, 985 (N.D. Cal. 1982), aff'd mem., 707 F.2d 517 (9th Cir. 1983); United States Olympic Committee v.

International Federation of Bodybuilders, 219 U.S.P.Q. 353, 356 (D.D.C. 1982). Apparently the Amateur Act serves as a type of subsidy to the USOC in lieu of direct financial support:

> The fundamental purpose of [the Amateur] Act was to safeguard the USOC"s ability to raise the financial resources that are a critical component of America's capacity to send world-class amateur athletes into international competition without the massive government subsidies enjoyed by competitors from other nations.

United States Olympic Committee v. Intelicense Corp., 737 F.2d at 264 (2d Cir.), cert. denied, 105 S.Ct. 387 (1984).

If this is the only interest supporting the USOC's monopoly, I seriously doubt whether it would justify even a [sic] minor a restriction on free speech. In words that seem to

address this very issue, Justice Marshall noted earlier this Term:

> While the interference with appellant's speech is, concededly, very slight, the State's justification -- the subsidization of another speaker chosen by the State -- is insufficient to sustain even that minor burden. We have held that the State may use its own resources for subsidization, Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983), but that interest, standing alone, cannot justify interference with the speech of others. See Buckley v. Valeo, 424 U.S. 1, 48-49 (1976)(per curiam); First national Bank of Boston v. Bellotti, 435 U.S. 765, 790-792 (1978).

Pacific Gas & Electric Co. v. Public Utilities Commission, 106 S.Ct. 903, 916 (1986)(footnote omitted)(Marshall, J., concurring).

B. Even if the government's interest in subsidizing the USOC were deemed sufficient to abridge some of

appellants' first amendment rights, we would still have to determine whether the broad monopoly granted by the Amateur Act "is not more extensive than is necessary top serve that interest." Central Hudson Gas, 447 U.S. at 566. Again, the cant record here makes that determination difficult, but the question is amenable to no simple answer. At the very least, it is necessary to consider whether USOC's commercial licenses could not be adequately protected by giving the USOC rights coextensive with those in the Lanham Act or by restricting its control over the use of the word Olympic in some other fashion. Or so, at least, do I read the Supreme Court's uniform pronouncements in this area. See, e.g., Police Department of Chicago v. Mosley, 408 U.S. 92, 101 n. 8 (1972) & authorities cited

therein; New York Times v. Sullivan, 376 U.S. 254, 279-83 (1963).

III.

While I hesitate to second-guess the panel's interpretation of the Amateur Act, I respectfully suggest that its conclusion that the USOC need not prove confusion or overcome Lanham Act defenses is not inevitable. If, as I suggest, the interpretation the panel adopts raises serious constitutional concerns, it may be appropriate to resort to a narrowing construction of the statute. See Regional Rail Reorganization Act Cses, 4129 U.S. 102, 134-36 (1974); United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 571 (1973). Because the panel failed to address what I see as the clear first

amendment implications of its decision, it did not consider the possibility of giving the Amateur Act a less sweeping interpretation.

IV.

By raising these concerns I do not necessarily conclude that the Amateur Act is irreconcilably at odds with the first amendment. Indeed, on this barren record I find it difficult to reach any but the most tentative conclusions about this highly unusual statute and its effect upon our personal liberties. What I find most troubling, however, is the haste with which appellants are being ushered out of court. The panel appears to have overlooked that where first amendment defenses are raised "[j]udgment as to whether the facts justify the use of the drastic power of

injunction necessarily turns on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise." Carroll v. Princess Anne, 393 U.S. 175, 183 (1968).

What appellants propose to do, after all, lies at the very heart of the first amendment: they wish to hold a public event to promote socio-political views some may find offensive. They claim that calling their event the Gay Olympic Games is essential to the message they wish to convey. A long and unbroken line of Supreme court cases stands for the proposition that "[a]ny prior restraint on expression come to [court] with a 'heavy presumption' against its constitutional validity." Organization for a Better Austin v.

O'Keefe, 402 U.S. 415, 419 (1971)(citing Carroll, 393 U.S. at 181; Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963)).[6] Under this standard, prior restraints have been struck down even where adopted to protect important public or private interests. See, e.g., New York Times v. United States, 403 U.S. 713 (1971)(national security); Organization for a Better Austin v. O'Keefe, 402 U.S. 415 (1971)(privacy). By contrast, the panel here approves a permanent injunction that significantly blunts rights to public expression without the slightest showing that the enjoined use would harm anyone.

Moreover, "[a]n order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional man-

date and the essential needs of the public order." Carroll, 393 U.S. at 183. I have much difficulty reconciling the blunderbuss injunction entered against SFAA with this admonition. With all due respect, the panel's offhand approval of this injunction, obtained as it was by summary judgment, simply does not measure up to the close appellate scrutiny due first amendment claims and defenses. See Bose Corp. v. Consumers Union of United States, Inc., 104 S.Ct. 1949, 1961-65 (1984); Standard Oil Co. vo California v. FTC, 577 F.2d 653 (9th Cir. 1978).

* * *

In sum, I believe that the petition for rehearing raises very serious arguments that deserve consideration and resolution by the court en banc. The panel fails to acknowledge the

difficult first amendment issues presented, regrettably bypassing what I consider to be clear and applicable guidance from the Supreme Court. The opinion will therefore prove a troublesome precedent, undermining not only the right to free speech, but also the laws protecting intellectual property, to the ultimate detriment of both.

While not every error by a panel can be addressed by the full court, the important and novel constitutional issues raised by this case, the panel's failure to adequately address them and the likely adverse effect the opinion will have on personal liberties, all strongly militate in favor of rehearing the case en banc. I therefore respectfully dissent from the court's refusal to do so.

FOOTNOTES

[1] Trademarks are recognized only upon a showing that the mark has been adopted and use in commerce. 15 U.S.C. §1051 (1982); Blue Bell, Inc. v. Farah Mfg. Co., 508 F.2d 1260, 1265 (5th Cir. 1975). Subsequent users may raise a series of defenses under section 33(b) of the Lanham Act, such as fraud on the Patent and Trademark Office, abandonment, fair use, misrepresentation of source, or violation of the antitrust laws. 15 U.S.C. §1115 (1982). There are also equitable defenses such as estoppel by laches, Anheuser-Busch, Inc. v. Du Bois Brewing Co., 175 F.2d 370, 374 (3rd Cir. 1949), cert. denied, 339 U.S. 934 (1950); estoppel by acquiescence, see National Football league v. Governor of Delaware, 435 F.Supp. 1372 (D.Del.1977); and unclean hands, see Precision instru-

ment Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806 (1945). Most importantly, trademark rights can only exist in distinctive terms and devices. 15 U.S.C. §1052 (1982); see Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352 (9th Cir.1985)(en banc). Similarly, there cannot be a trademark in a purely functional device. Fotomat Corp. v. Photo Drive-Thru, Inc., 425 F.Supp. 693 (D.N.J.1977); see Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 119-20 (1938). Distinctiveness is central to the status of a mark. A legitimate trademark will lose its status if it becomes generic. Bayer Co. v. United Drug Co., 272 F. 505 (S.D.N.Y.1921)(declaring the term 'aspirin,' originally a trademark, to be the common name of a non-prescription drug). Thus, trademark owners have an exclusive right to use

the mark only to the extent necessary to safeguard the integrity of the product source. J. Gilson, Trademark Protection and Practice, §1.03[5](1985).

[2] Copyrights are of limited duration, U.S. Const., Art. 1, §8; 17 U.S.C. §302 (1982), and are subject to a number of defenses, most notably the defense of fair use. 17 U.S.C. §§107-117 (1982). Copyright protection will not extend to the idea itself, Baker v. Selden, 101 U.S. 99 (1880)(no copyright in accounting system); or to purely utilitarian objects, Mazer v. Stein, 347 U.S. 201 (1954)(allowing copyright of figurative lamp base, although lamp itself was functional).

[3] Patents are granted only for subject matter that is novel, useful and non-obvious. 35 U.S.C. §§101-103 (1982). They are limited in time. U.S. Const.

Art. I, §8; 35 U.S.C. §154 (1982). They are also subject to a variety of legal and equitable defenses, including patent misuse, Sonobond Corp. v. Uthe Technology, Inc., 314 F.Supp. 878 (N.D. Cal. 1970); invalidity, Lang v. VSL Corp., 219 U.S.P.Q. 625, 627 (E.D. Va. 1982); expiration of the statute of limitations, 35 U.S.C. §286 (1982); laches and estoppel, Potter Instrument Co. v. Storage Technology Corp., 641 F.2d 190, 191 (4th Cir.), cert. denied, 454 U.S. 832 (1981); and inequitable conduct before the Patent and Trademark Office, J.P. Stevens Co. v. Lex Tex, Ltd., 747 F.2d 1553 (Fed. Cir. 1984), cert. denied, 106 S.Ct. 73 (1985).

[4] An examination of business listings in metropolitan telephone directories gives some indication of the Amateur Act's sweep. In Los Angeles there

are listings for over 140 businesses whose name starts with the word Olympic, many of them located on Olympic Boulevard. Pacific Bell, White Pages: Los Angeles 773-74 (1985). The Manhattan directory has about 60 listings. New York Telephone, NYNEX White Pages: Manhattan 1142 (1985). The directory for Olympia, Washington, has over 30 listings. Pacific Northwest Bell, White & Yellow Pages: Olympia, Lacey & Tumwater 111 (1985). Among the listings are such diverse businesses as the Olympic Bar B Que Restaurant; Olympic Donuts; the Olympic Married Matching Service; the Olympic Tae Kwon-Do Karate Studio; Olympic Trailer Movers; the Olympic Memorial Funeral Home; Olympic Unpainted Furniture; Olympic Wall Street Services; and the Olympic Headwear Novelty Company. These trade names, and what must be

hundreds more across the country, presumably violate the Amateur Act as interpreted by the court.

[5] As the Court held in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975), "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship -- reflecting the natural distaste of a free people -- is deep-written in our law." Accord Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1409 (9th Cir.)(first amendment violation found because of "impermissible risk of covert discrimination based on the content of or the views expressed in the operator's proposed programming"), cert. granted, 106 S.Ct. 380 (1985).

[6] Courts have been particularly vigilant in guarding the first amendment rights of groups espousing unpopular points of view. See, e.g., Carroll v. Princess Anne, 393 U.S. 175 (1968)("white supremacist" National States Rights Party); Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978)(Nazis).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORIA

BEFORE: THE HONORABLE J.P. VUKASIN, JUDGE

INTERNATIONAL OLYMPIC COMMITTEE, ETC., AND THE UNITED STATES OLYMPIC COMMITTEE, ETC.,	No. C-82-4183-JPV
PLAINTIFFS AND CROSS-DEFENDANTS.	SAN FRANCISCO, CALIFORNIA
vs.	
SAN FRANCISCO ARTS & ATHLETICS, AND THOMAS P. WADDELL,	
DEFENDANTS AND CROSS-PLAINTIFFS.	

REPORTERS' TRANSCRIPT

THURSDAY, FEBRARY 2, 1984

A P P E A R A N C E S:

FOR PLAINTIFFS: VAUGHN R. WALKER
ROBERT A. GORDON
PILLSBURY, MADISON
& SUTRO
225 BUSH STREET
SAN FRANCISCO,
CALIFORNIA 94120

FOR DEFENDANTS: MARY C. DUNLAP
425 STAPLES AVENUE
SAN FRANCISCO,
CALIFORNIA 94112

Page 52, Line 25 through
Page 55, Line 10:

THE COURT: I don't think that's relevant to the argument. Thank You. The matter is submitted.

I refer to Section 380 of the Amateur Sports Act of 1978.

Falling on that reference it appeared that defendants first argue that the tending to cause confusion standard must be read in the overall prohibition on the use of the term "Olympic" to promote any athletic performance or competition and that this is a question of fact which cannot be determined on a motion for summary judgment.

Secondly, they argue that even if this standard is not read in the use of the term "Gay Games" in connection with "Olympic," is a combination under a

subsection of Section 380 in invoking the allegedly factual "tending to cause confusion" standard.

Regarding first contention that "tending to cause confusion" standard should not be applied to the basic promotion of athletic contests, the dramatical construction and a plain meaning of the statute indicates that this alone is sufficient violation to impose liability.

The reference already made to the opinion of the Ninth Circuit any other interpretation will be deemed "inawkward construction."

Defendants' other claim is also without merit to infer that Gay Olympic Games is a combination requiring the U.S.O.C. to prove "tendency to cause confusion" distorts the Congressional intent that an authorized use of the

term "Olympic" does not require proof of such tendency otherwise obviously the U.S.O.C. would be compelled to present, I would say, such proof whenever an infringer uses the word "Olympic" by any other word.

Defendants contended that their use of the "Olympic" constitutes a quote "fair use" unquote defense under the Trademark Act. This Court's reading of Section 380 indicates that 380 incorporates only the remedies of the Trademark Act and nothing in the language or the legislative history of Section 380 indicates that the Trademark Act's defenses were to be incorporated as well.

Defendants have claimed that the U.S.O.C. is a governmental actor subject to certain constitutional scrutiny. The only case to have dealt with

this question expressly found that that doctrine did not file.

Defendants also have contended as a defense the alleged violation of their First Amendment rights and 14th Amendment rights. These arguments can be disposed of on the grounds that quote "no state action" unquote is present because the U.S.O.C. is not a governmental actor.

The defendants have contended that the proposed injunction permanently prohibiting them from using the term "Olympic" is too broad.

They also contend that they should be allowed to use that word with a suitable disclaimer. I think it's the opinion of this Court that this argument would undermine the purpose of the Amateur Sports Act of 1978 and, in effect, with countenance allowing any

infringer, however objectionable, to use "Olympic," as long as it expressly disallowed any connection with the U.S.O.C.

It appears to the Court that tehre are no triable issues of fact. Summary Judgment shall be granted in favor of the Plaintiffs and a Preliminary Injunction is hereby made permanent.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America	82-4467 D.C.# C-82-4183-RFP
Plaintiffs-Cross-Defendants-Appellees,	MEMORANDUM ORDER GRANTING PLAINTIFFS' MOTION FOR AWARD OF ATTORNEY FEES
vs. SAN FRANCISCO ARTS & ATHLETICS, and Thomas P. Waddell,	
Defendants-Cross-Plaintiffs-	

Filed -- September 21, 1984

Plaintiffs International Olympic Committee (IOC) and United States Olympic Committee (USOC) previously have prevailed in this Court against defendants San Francisco Arts & Athletics and Thomas Waddell in an action under the Amateur Sports Act of 1978 (36 U.S.C. §371, et seq.) to enjoin defendants' infringement of Olympic terminology and symbols. Plaintiffs now move for an award of attorney's fees against defendants. This matter came on regularly for hearing before this Court, the Honorable J.P. Vukasin, Jr., District Judge, presiding. Having considered both the oral and written arguments of counsel and all the pleadings submitted, the Court by this order grants plaintiffs' motion for attorney's fees in the amount of $96,600.00.

Remedies under the Amateur Sports Act are addressed in 36 U.S.C. §380. This section provides that remedies available to parties are those provided under the Lanham Trademark Act of 1946 (15 U.S.C. §1051, et seq.). 36 U.S.C. §380(a). The Lanham Trademark Act addresses attorney's fees in 15 U.S.C. §1117, wherein it provides that the Court may award reasonable attorney's fees to the prevailing party "in exceptional cases."

The parties disagree as to the interpretation of 15 U.S.C. §1117. In enacting the Amateur Sports Act, plaintiffs argue, Congress made reference to 15 U.S.C. §1117 as a shorthand method of referring to the nature of remedies (attorney's fees) available under the Amateur Sports Act. The standard for granting attorney's fees, according to

plaintiffs' interpretation of the legislative history, was intended to be one of complete discretion in the Court. Defendants, however, argue that reference to §1117 must necessarily include the standard developed by cases applying this section to trademark cases. The standard developed by the case law circumscribes the Court's discretion to awarding attorney's fees only in those cases where infringement may be characterized as malicious, fraudulent, deliberate or wilful. Jellibeans, Inc. v. Skating Clubs of Georgia, Inc., 716 F.2d 833, 841 (2nd Cir. 1983); but see United States Olympic Committee v. Intelicense, 737 F.2d 263, 267 (2d Cir. 1984).

Even accepting the latter argument, an award of attorney's fees is doubtless appropriate, given the par-

ticularly egregious actions of defendants. Declarations submitted by defendants themselves evidence that their use of Olympic terminology and symbols was deliberate and wilful. As early as December, 1981, defendants were informed that the USOC and the IOC regarded their use of Olympic terminology as a violation of the Amateur Sports Act. Defendant Waddell agreed at one point to cease use of Olympic terminology and symbols in deference to the USOC's objection. After a change of heart, however, and in spite of being fully advised by counsel that their use of Olympic designations could be held a violation of the Amateur Sports Act, the defendants resumed use of the terminology and symbols in promoting their activities. Their flagrant use of the terminology and symbols continued

uninterruptedly for an extensive period thereafter, and only closed upon the issuance of an injunction by this Court. Defendants apparently felt secure in their misconduct owing to the mistaken belief that, due to the homosexual orientation of their organization, they possessed a valid constitutional defense to prosecution under the Amateur Sports Act.

There is no more appropriate description of defendants' conduct in this case than deliberate and wilful. Not only were defendants' action wilful in that they intended the result of their actions, defendants knowingly, deliberately and wilfully violated the letter of the Amateur Sports Act. The circumstances thus justify the imposition of attorney's fees regardless of which standard argued by the parties is applied.

Defendants further contend that their constitutionally-based defense to the infringement action was plausible and that an award of attorney's fees is therefore appropriate. The standard, however, is not whether the defense was frivolous or not. The wilful or deliberate nature of defendants' actions, not the qualify of the defense, is of concern to the Court. One who violates a statute on the advice of counsel that the statute may be unconstitutional has committed no less a wilful violation because of the desire to precipitate a constitutional "test" case than any other violator. Cf. La Raza of Southern Alameda County v. Volpe, 440 F.Supp. 904 (N.D. Ca. 1977).

An award of attorney's fees in this case also promotes the goals of the Amateur Sports Act. The Act is

intended to develop, foster, and promote amateur athletics in this country. 36 U.S.C. §374. Because the USOC is the only National Olympic Committee that does not receive formal financial assistance from its host governing, financing the United States Olympic Team poses unique obstacles. See United States Olympic Committee v. Intelicense, supra, 737 F.2d at 266. In that case, Judge Irving Kaufman addressed himself to this point in the following words: "The fundamental purpose of [the] Act was to safeguard the USOC's ability to raise the financial resources that are a critical component of America's capacity to send world-class athletes into international competition without the massive government subsidies enjoyed by competitors from other nations." Id., at 264.

Mindful of that important objective, it is readily apparent to the Court that this goal is frustrated when large amounts of funds are diverted to prosecute legal actions against infringers. An award of attorney fees here would replenish the funds channeled away from the promotion of amateur athletics, funds used for the more constructive purpose of implementing the USOC's athletic programs. The public interest is best served by having the costs necessary for enforcement of the Amateur Sports Act borne by those who wilfully and deliberately violate that statute.

Accordingly, for the reasons outlined above, IT IS HEREBY ORDERED that

Plaintiffs' motion for attorney's fees in the amount of $96,600.00 is GRANTED.

DATED: September 21, 1984

J.P. VUKASIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America,	No. C-82-4183 J.P.V.
Plaintiffs,	JUDGMENT
vs.	
SAN FRANCISCO ARTS & ATHLETICS, and Thomas P. Waddell,	
Defendants.	

Filed February 16, 1984

Plaintiffs having moved for summary judgment in their favor and against defendants on the complaint and dismissing defendants' counterclaims, the said motion having on February 2, 1984 come on before the Court, which indicated its intention to grant the motion

and which has entered its order granting the same,

N o w, T h e r e f o r e, it is ORDERED, ADJUDGED and DECREED as follows:

1. Defendants, their employees, agents, officers, attorneys and representatives, all persons participating with or act in concert with them, and each of them, shall immediately cease, desist and refrain from using or causing to be used for the purpose of trade, to induce the sale of any goods or services, or in connection with any advertising, promotion, publicity or production of any theatrical exhibition, athletic performance or competition:

(a) "Olympic" or "Olympiad"; or

(b) any combination or simulation of "Olympic" or "Olympiad" or any

other word, term, name, trademark, trade name, sign, symbol, emblem or insignia tending to cause confusion, or to cause mistake, to deceive or falsely to suggest a connection with the International Olympic Committee, the United States Olympic Committee or any Olympic activity or authorization by the International Olympic Committee or the United States Olympic Committee.

2. Defendants' counterclaims be and the same are dismissed and defendants shall taking nothing by their counterclaims.

3. Plaintiffs shall recover their costs of action.

DATED: February __, 1984

/s/J.P. Vukasin, Jr.
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America	)	82-4467
	)	D.C.# C-82-4183-RFP
	)	MEMORANDUM
Plaintiffs-Cross-Defendants-Appellees	)	
vs.	)	
SAN FRANCISCO ARTS & ATHLETICS, and Thomas P. Waddell,	)	
Defendants-Cross-Plaintiffs-Appellants.	)	

Argued and Submitted
March 15, 1983

Before HUG and FARRIS, Circuit Judges, and GADBOIS, District Judge.*

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* Hon. Richard A. Gadbois, United States District Judge for the Central District of California, sitting by designation.

This appeal is from a preliminary injunction enjoining appellants, pursuant to 36 U.S.C. §380, from using the word "Olympic" "for the purposes of trade, to induce the sale of any goods or services, or in connection with any advertising, promotion, publicity or production of any theatrical exhibition, athletic performance, competition or event." We affirm the district court.

Our review of an order granting or denying a preliminary injunction is limited. Such an order will be reversed only if the district court "relied on an erroneous legal premise or abused its discretion." Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 752 (9th Cir. 1982).

The district court applied the correct standard for determining wheth-

er a preliminary injunction should issue. See Benda v. Grand Lodge of the Int'l Ass'n of Machinists & Aerospace Workers, 584 F.2d 308, 314-15 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979).

Appellants contend that the district court erred in finding that appellees had demonstrated a sufficient probability of proving that appellants' use of the word "Olympic" would tend to cause confusion. The district court based its finding on the similarities between appellants' games, known as the "Gay Games," and the official Olympic games. The Gay Games are apparently modeled on the official Olympic games. Ten of the seventeen events in the Gay Games are official Olympic events. The Gay Games include such ceremonial events as the carrying of a torch, an

opening parade, and the closing ceremonies. Participants march behind the flags and the cities and countries they represent at opening and closing ceremonies. Appellants argue that the purpose and character of the Gay Games is completely different from that of the official Olympics. They contend a primary purpose of the Gay Games is to create a more realistic public image of homosexuals. In addition, the organizers of the Gay Games contend they stress self-fulfillment, rather than winning, and seek to minimize nationalism. On this record, it was not an abuse of discretion for the district court to find that appellants had demonstrated a sufficient likelihood of success on the merits. The differences between the Gay Games and the official Olympics are not such that they compel

the conclusion that appellees probably will not be able to prove a tendency to confuse.[1]

Appellants also argue that the district court improperly employed a "presumption of unlawfulness" against their use of the word "Olympic." We do not read the district court's use of the "presumption" as indicating that a legal presumption was applied. Read in context, it is clear that the district court's conclusion was based on the record before it without the aid of a legal presumption.

Appellants' first amendment arguments also do not warrant reversal. The injunction accords with the provisions of 36 U.S.C. §380 and is not overbroad. Appellants are not enjoined from making factually correct statements which mention the Olympic games. There is no

first amendment right to use the word "Olympic" in the title of appellants' games so long as there are other adequate means by which appellants can communicate their message. See Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2nd Cir. 1979).

For the reasons set forth in the district court's opinion, appellants' remaining arguments, including their discrimination argument, are not grounds for reversing the district court.

The district court's order granting the preliminary injunction is AFFIRMED.

FOOTNOTE

1 PAGE 3

By affirming the district court on this issue, we do not mean to imply that it is necessary in this case to prove a tendency to confuse. The grammatical construction and legislative history of 36 U.S.C. 380 raise the possibility that when the word "Olympic" is used "for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition," as may have been done in this case, it is not necessary to show that it "tend[ed] to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity." The "tending to cause confusion" requirement may apply only to combinations or

simulations of the words "Olympic," "Olympiad," or "Citius Altius Fortius," and not to the use of those precise words.

> Sections 380's predecessor, 36 U.S.C. [former] §379, imposed criminal penalties for the unauthorized use of the words "Olympic," "Olympiad," or "Citius Altius Fortius," for commercial, theatrical, athletic, or competitive purposes. There was no requirement of tending to cause confusion, mistake, or deception.

The changes in the law made by section 380 were explained in a letter from the Commissioner of Patents and Trademarks which was made a part of the House Report on that legislation. That letter indicates that section 380 was intended to carry forward the prior

law's prohibition on the use of the words "Olympic," "Olympiad," and "Citius Altius Fortius," and to add to this list combinations and simulations tending to cause confusion, mistake, or deception. H.R. Rep. No. 1627, 95th Cong., 2nd Sess. 37, 38, reprinted in 1978 U.S. Code Cong. & Ad. News 7478, 7495, 7496. The Commissioner's letter also states:

> Section [380 (a)(4)] makes actionable not only use of the words "Olympic," "Olympiad," "Citius Altius Fortius," and any combination thereof, but also any simulation . . . thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity.

Id. at 38, 1978 U.S. Code Cong. & Ad. News at 7496.

The grammar of section 380 also raises the possibility that it is not

necessary to show a tendency to confuse in connection with the use of the word "Olympic." It would be an awkward construction if the phrase "tending to cause confusion" was intended to modify the words "Olympic," "Olympiad," and "Citius Altius Fortius."

We need not reach this question of statutory interpretation, however, since the district court assumed that it was necessary to show a tendency to confuse and the parties have not raised the issue on this appeal. If it was not necessary to show a tendency to confuse, appellees' case for a preliminary injunction would have been even stronger. We point out this issue only so that the parties will have an opportunity, if they so choose, to more fully explore it before the district court issues its final judgment.

APPENDIX H'

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America,	)	No. C-82 4183 RFP
Plaintiffs,	)	O R D E R
vs.	)	
SAN FRANCISCO ARTS & ATHLETICS, a California corporation; THOMAS F. WADDELL,	)	
Defendants.	)	

Filed August 20, 1982

Plaintiffs International Olympic Committee and United States Olympic Committee seek to enjoin defendants from using the word "Olympic" in connection with the organization and conducting of athletic competitions or

performances scheduled to commence in San Francisco on August 28, 1982. Plaintiffs seek relief under the International Convention for the Protection of Intellectual property and for unfair competition (15 U.S.C. §1126(h)), for violation of the Amateur Sports Act of 1978 (36 U.S.C. 371 et seq.), for federal trademark infringement (15 U.S.C. §1114), for false designation of origin, false description or representation (15 U.S.C. §1125(a)), for breach of contact between the parties, and for dilution of plaintiffs' distinctive marks (California Business & Professions Code §14330). Jurisdiction of this court arises under 28 U.S.C. §1331, 1337, and 1338.

Plaintiff International Olympic Committee (IOC) is a nonprofit organization created by Congress of Paris of

June 23, 1894, and organized and existing under the laws of Switzerland. IOC's principal place of business is Lausanne, Switzerland. Plaintiff United States Olympic Committee (USOC) is a private, nonprofit corporation duly chartered and existing under the laws of the United States of America (36 U.S.C. §§371-396),[2] having its principal place of business at Colorado Springs, Colorado. USOC does business in California and elsewhere in interstate commerce.

Defendant San Francisco Arts & Athletics (SFAA) is a corporation

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[2] The USOC was first incorporated and granted a federal charter in 1950. Pub.L. No. 81-805, 64 Stat. 899. However, predecessors to the now federally-chartered USOC have existed since 1896. DeFrantz v. United States Olympic Committee, 492 F.Supp. 1181 (D.D.C. 1980).

organized and existing under the laws of California, having its principal place of business in California and elsewhere in interstate and foreign commerce. Defendant Thomas F. Waddell, M.D., is a resident of the City and County of San Francisco. Waddell is currently on leave from his job as Medical Director of Whittaker Corporation of Los Angeles so that he may serve as a non-salaried President of SFAA and Chairman of the Gay "Olympic" Games.

The court finds that the relevant facts surrounding the current motion are as follows. SFAA filed papers of incorporation with the State of California approximately one year ago. The nonprofit organization attempted to incorporate under the name "Golden Gate Olympic Association." The California

Department of Corporations informed them that the word "Olympic" could not be used in a corporate title. Hence, on November 4, 1981, it filed for incorporation as San Francisco Arts & Athletics.

Defendants were under the impression that, despite the fact that "olympic" could not be part of their corporate title, they could nevertheless use the word to describe the series of athletic games they intended to sponsor from August 28 to September 5, 1982. As early as September 1981, defendant Waddell received word indirectly that the USOC had become aware of the Gay "Olympics" and were troubled by the potential trademark infringement. Waddell was advised to write to the USOC seeking permission to use the word "olympic" in connection with the upcom-

ing Gay Games. Waddell says he was informed that this request was a mere formality. The letter was mailed to F. Don Miller, Executive Director of USOC, on December 26, 1981.

Apparently unknown to Waddell, Miller had sent a letter addressed to the "Gay Olympic Games" on December 23. At that time, Miller brought to the attention of Waddell the existence of the Amateur Sports Act of 1978 (Pub. L. 95-606; 36 U.S.C. §380) and asked the Gay "Olympics" to terminate immediately its use of the word "olympic." This position was reiterated on January 6, 1982, in a responsive letter to Waddell's request of December 26.

Waddell apparently did not immediately receive the January 6 letter from Miller. On January 15, 1982, he called Miller and asked for a response to his

request. Miller explained the USOC's position and once again demanded termination of the use of the word "olympic."

On January 18, 1982, Waddell wrote to Miller and agreed to drop the word "olympic" from the Gay Games. The relevant portion of the letter read:

> As per your request and according to the letter of Public Law 95-606-Nov. 8, 1978, we have discontinued the use of the term "Olympic" to describe our event.
>
> We have, as an interim measure, blocked out the term "Olympic" and in all subsequent printed materials will substitute the term "Athletic."

Waddell now claims the letter was meant only to indicate the SFAA would cease use of the term "olympic" as an interim compromise, pending negotiations over use of the word. We believe, to the contrary, that the letter agreed

to cease permanently the use of "Olympic" and that the "interim measure" mentioned in the letter referred to the fact that defendants would block out "olympic" from their old stationery and posters until such time as new printed materials could be obtained.

Miller responded to Waddell's letter of January 18 nine days later. He acknowledged receipt of Waddell's letter and indicated appreciation that the Gay "Olympic" Games would henceforth be the Gay "Athletic" Games. Waddell, however, had recently been conferring with legal counsel who informed him that they believed the USOC was acting in a discriminatory and unconstitutional manner. Consequently, Waddell wrote a lengthy letter to Miller on January 26 renewing his original request for permission to use

the word "olympic." Waddell implied that denial of his request might cause the SFAA to seek declaratory relief in the courts.

Miller never personally responded to this last correspondence. Instead, Richard Kline, legal counsel for the USOC, wrote to Waddell on February 2. Kline said that the USOC and SFAA had reached a binding agreement in their previous exchange of letters (specifically, USOC's letter of December 12, 1981, and Waddell's letter of January 18, 1982) as evidenced by the USOC's response of January 27, 1982. In conclusion, Kline insisted that the SFAA "adhere to this agreement" and refrain from use of the word "olympic" in its upcoming Games.

Waddell claims that on February 2, he conferred with the Northern Calif-

ornia chapter of the American Civil Liberties Union (ACLU) concerning this subject and was advised (1) not to take legal action against the USOC, but (2) if the SFAA was sued by the USOC, the ACLU would defend it. Waddell says he then decided to resume the use of the word "olympic," "in the firm belief that we had as much right to use the term as other organizations who had used it without permission from the USOC." (Waddell Declaration at p. 7.)

The USOC claims it received no indication subsequent to its letter of February 2 that the SFAA planned to resume use of the word and that it therefore took no action. Defendants asserts that Waddell's letter of January 26 informed the USOC that they intended to put on the Gay "Olympic" Games rather than the Gay "Athletic"

Games. Due to the fact that a number of letters were sent between plaintiffs and defendants during this period, many of them crossing paths "like ships in the night," the court finds it likely that each party was under the impression that it had forced its wishes upon the other party and that each had achieved its respective goals.

According to plaintiffs, the first notice they had that the SFAA had resumed use of the term "Gay Olympics" was an article which appeared in the San Francisco Examiner & Chronicle on Sunday, May 23, 1982, entitled "A very serious Gay Olympics." Miller reacted to the article by having his staff investigate and, after confirming SFAA's resumption of the word "Olympic," raised the issue with the IOC in London and with the USOC's Administra-

tive Committee. On August 9, plaintiffs filed the present lawsuit and sought a temporary restraining order to prevent defendants from using "olympic" in connection with the Gay "Olympic" Games. Due to this court's unavailability, the motion was heard before the Honorable Samuel Conti on August 9. Judge Conti, focusing especially on the plaintiff's "probable success on the merits," granted the restraining order.

The matter is now before this court on plaintiff's motion for a preliminary injunction. Oral argument was heard on August 19, 1982, with all parties represented by counsel. Based upon this evidentiary record, the parties' moving papers and supporting affidavits, and arguments of counsel, the court issues the findings of fact and conclusions of law contained in this order. Fed. R. Civ. P. 52(a).

Until four years ago, the section of the USOC's federal charter governing unauthorized use of words and symbols associated with the Olympic Games was 36 U.S.C. [former] §379, which provided criminal penalties for such misuse. The charter did not concern itself with trademark protection as such, except insofar as criminal penalties provided a disincentive to trademark infringement. In 1978, Congress repealed the criminal penalties and passed a new Amateur Sports Act of 1978, 36 U.S.C. §380, which the President signed into law on November 8 of that year. The new act expressly provided for a civil action under the Trademark [Lanham] Act of 1946, 15 U.S.C. §1051 et seq.

> Without the consent of the Corporation [USOC], any person who sues for the purpose of trade, to induce the sale of any goods or

> services, or to promote any theatrical exhibition, athletic performance, or competition--
>
> (1) ...
>
> (2) ...
>
> (3) ...
>
> (4) the words "Olympic," "Olympiad," "Citius Altius Fortius," or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity;
>
> shall be subject to suit in a civil action by the Corporation for the remedies provided in the Act of July 5, 1946 (60Stat. 427; popularly known as the Trademark Act of 1946).

This subsection also contains a grandfather clause permitting continued use of any similar words and symbols used lawfully before September 21, 1950, and subsection (b) permits the USOC to license the protected words and symbols. Subsection (c) provides that:

> The Corporation shall have exclusive right to use the name "United States Olympic Committee"; ... and the words "Olympic," "Olympiad," "Citius Altius Fortius" or any combination thereof subject to the pre-existing rights described in subsection (a) of this section.

Plaintiffs argue that subsection (a) of the statute makes actionable any use in trade of the word "Olympic" whether or not such sue would be actionable on a trademark or unfair competition theory. Further, they note that subsection (c) provides that the USOC shall have the exclusive right to use "Olympic." Thus, plaintiffs argue, any unauthorized use of "Olympic" would be unlawful. By reserving the exclusive use of "Olympic" to the USOC, the Amateur Sports Act forecloses the possibility of any other party obtaining any protectable rights in "Olympic."

Because the Amateur Sports Act has only recently been amended and provided with civil remedies, relatively little case law interpreting the statute can be found. Defendants argue that this court should be guided by the opinion in Stop The Olympic Prison v. United States Olympic Committee, 489 F.Supp. 1112 (S.D.N.Y. 1980) [hereinafter "S.T.O.P."]. The S.T.O.P. case involved a nonprofit public interest group concerned with prison reform and organized to increase public awareness of and generate opposition to the construction of a federal prison that would also be used to house athletes participating in the 1980 Lake Placid Winter Olympic Games. To further its protest activities, S.T.O.P. designed and distributed a poster with the legend "STOP THE OLYMPIC PRISON" which displayed the Olympic rings and torch.

The court in S.T.O.P. agreed that, in awarding the USOC the exclusive right to use the word "Olympic" and the Olympic symbols, Congress had used broad wording. Nevertheless, the court held, "subsection (c)...cannot be interpreted to mean that only the defendant and its licensees may use the word "Olympic" and the enumerated symbols for any purpose whatsoever." Id. at 1119.

The S.T.O.P. court felt compelled, accordingly, to analyze the statute to determine "the range of uses to which the USOC may properly claim exclusive right under section 380." Id. Judge Cannella concluded that Congress' objective in passing the Amateur Sports Act was "to establish strong protection for the Olympic symbols, in part to ensure the market value of licenses for

their use." Id. at 1120. With this objective in mind, he held that S.T.O.P.'s poster violated neither subsection (a) nor subsection (c) of section 380. The S.T.O.P. poster, he explained, was not used "for the purposes of trade," or "to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition." Id., quoting section 380.

To the extent that Judge Cannella concluded that section 380 does not establish a per se rule against the unauthorized use of the word "Olympic" and the Olympic symbols, this court agrees with his opinion. We must proceed to analyze defendants' acts and actions to determine whether they fall within the "range of uses" to which the USOC may properly claim exclusive rights under the Amateur Sports Act.

Factually, though, the S.T.O.P. opinion differs significantly from the instant case. As noted above, the S.T.O.P. organization was a public interest group concerned with prison reform. it was only coincidentally connected with the Olympic Games. S.T.O.P. was not seeking to promote any theatrical exhibition, athletic performance, or competition by its use of the word "Olympic" and the Olympic symbols in its poster.

On the other hand, defendant SFAA is organizing a series of athletic events of an international scope[3] modeled on the original Olympic Games. Although the Gay Games are to include

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[3] To date, representatives from at least eleven other countries are to participate in the Gay Games. (Brown Declaration at p. 2.)

seven sporting events which are not in the Olympic Games because they are popular as organized sports in gay communities,[4] the Gay Games also are to include at least ten sporting events which are in the Olympic Games.[5]

In addition, the Gay Games, although sponsored by the gay community, are open to both homosexuals and heterosexuals. Moreover, the long range goal of the sponsors is apparently to sever the Games from their direct connection with the gay community altogether.

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[4] Billiards, bowling, softball, golf, powerlifting, physique, and rugby.

[5] Basketball, volleyball, boxing, cycling, wrestling, track and field, marathon, swimming and diving, soccer, and tennis [added as an exhibition event in the 1984 Games, thereafter to be an official event].

> The inventor, architect and all-year worker for the Gay Olympics is a medical doctor, Tom Waddell, who finished sixth in the 1968 Olympic Games decathlon, in Mexico City. And here's the shocker (to some). If he had his way, he'd remove the word "Gay" from this competition and the entire community or movement.
>
> I don't like labels," he explained. "A great many of us want gay returned to its dictionary meaning -- keenly alive and exuberant, having high spirits, being happily excited. But it is difficult to change an impression of the Gay Olympics. I'd like to change it to People's Olympics. Please believe that it will be an athletic competition and a means of self-fulfillment for everyday people doing everyday things.

"A Victory For the Gay Olympics," San Francisco Chronicle, Thursday, July 29, 1982, p.43.

Further, defendants' plans include Olympic ceremonial events, including the carrying of a torch, an opening

parade, and closing ceremonies. Participants will represent their countries or cities and march behind the flags of these at the opening and closing ceremonies.

Finally, defendants attempt to distinguish the philosophy of the Gay Games as opposed to the Olympic Games. Foremost, of course, is the laudable goal of "creating a more realistic image of homosexual men and women in all societies" and to "provid[e] more alternatives for homosexual men and women to move into the mainstreams of their respective societies." (Waddell Declaration at p.8.) Defendants also assert, however, that their philosophy attempts to create a different climate of competition than in the Olympic Games.

> We want to stress self-fulfillment rather than winning; we want to exploit the potential for combining physical fitness and achievement through competition without making winning the most important element.
>
> We also want to minimize nationalism, so we used cities as the smallest common denominator. To minimize ageism we have made some events "age-group" competitions. To minimize sexism we have mixed the genders in some sports (relays in swimming and track and field, for example, are mixed).

Waddell Declaration at p.8.

As plaintiffs noted at oral argument, though, this stated philosophy is not antithetical to the Olympic philosophy as set forth in the Olympic Creed:

> The most important thing in the Olympic Games is not to win but to take part, just as the most important thing in life is not the triumph but the struggle. The essential thing is not to have conquered but to have fought well.

These similarities between the Gay Olympics and the Olympics sufficiently distinguish the instant case from S.T.O.P. Moreover, they make out a prima facie case of violation of the Amateur Sports Act. Section 380(a)(4) makes actionable any use of the word "Olympic" or similar terms "tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity." By its choice of the word "tending" rather than "likely," Congress must have meant to place less of a burden on a plaintiff under a section 380 cause of action than that placed upon a plaintiff suing under the Trademark Act alone. We hold that under the circumstances of this case, the court may presume that defendants' actions tend to cause confusion and mistake and

tend to suggest falsely a connection between their athletic games and those of the USOC. We express no opinion whether such a presumption would be permitted to aid plaintiffs were the Gay Games not of a national and international scope, or were the participants limited to a special group or groups, or were the Gay Games not modeled so closely in both events and ceremonies to the Olympic Games. Because the analysis must necessarily be heavily factually oriented, the decision must be made on a case by case basis.

Plaintiffs have demonstrated, therefore, their probable success on the merits of their cause of action under the Amateur Sports Act. Accordingly, it is unnecessary for us to consider plaintiffs' other six causes of action.

In the Ninth Circuit, however, probable success on the merits, without more, is not a sufficient group for the issuance of a preliminary injunction. The moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. These are not separate tests, but the outer reaches "of a single continuum." Los Angeles Memorial Coliseum Com'n v. National Football League, 634 F.2d 1197 (9th Cir. 1980), quoting Benda v. Grand Lodge of International Ass'n of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978). Having determined that plaintiffs have met the probable success standard, we must consider the issue of irreparable injury.

Courts have uniformly recognized that irreparable injury attends trademark infringement. See Visa International v. Bankcard Holders of America, 211 U.S.P.Q. 28, 38 (N.D.Cal. 1981). Once plaintiffs have made out a prima facie case of infringement under the Trademark Act, they are ordinarily aided with a presumption of irreparable injury.

> [A] detailed showing of the danger of irreparable harm is not required in a copyright infringement action where the copyright holder establishes a prima facie case of infringement. [citations] Furthermore, in the usual copyright infringement case a presumption may be raised that irreparable harm will befall the copyright holder upon the infringement of its exclusive use of the copyrighted matter. [citations] Similarly, the infringements of one's trademark usually in and of itself gives raise to the distinct possibility of irreparable injury. [cita-

> tions] When a trademark is infringed, the owner's business reputation and good will are placed in jeopardy due to his inability to exercise any control over the nature and quality of goods being sold or advertised under the infringing trademark. [citations] In addition, it is usually difficult, it not impossible, for the trademark owner to must sufficient proof of the precise measure of its damages or to show how much of any provable injury can be solely attributed to the infringement.

Miller Brewing Co. v. Carling O'Keefe Breweries, 452 F.Supp. 429, 437-38 (W.D.N.Y. 1978).

Loss of business is not the test of irreparable injury in a motion for preliminary injunction against the use of a trademark. The fact that plaintiffs have had the symbol of their reputation placed in the hands of another is irreparable injury. "The injury is to plaintiff's interest in

having exclusive control over the symbol of its own reputation.... The irreparable harm is the damage which will be done to plaintiff's mark itself." Visa International, supra, quoting Louis Rich, Inc. v. Horace W. Longacre, Inc., 423 F.Supp. 1327 (E.D. Pa. 1976).

As noted above, Congress has provided that the USOC may sue for infringement of their "Olympic" mark and symbols for the remedies provided in the Trademark Act of 1946. Having made out a prima facie case herein, the USOC is entitled to the same presumption of irreparable harm afforded other trademark holders who have made out a prima facie case. Accordingly, plaintiffs have satisfied the requirements for the issuance of a preliminary injunction.

Defendants have alleged that the prosecution of this lawsuit by the international and national Olympic committees violates certain rights guaranteed to defendants under the first and fourteenth amendments to the United States Constitution. Defendants argue impassionedly that, since the main objective of Congress in passing section 380 was to ensure the market value of licenses for the use of the Olympic symbols, S.T.O.P., 489 F.Supp. at 1120, to issue an injunction in the instant case would exceed the parameters of the legislation. Defendants argue that the goals of their nonprofit organization are educational, political, and cultural, not commercial, and that therefore an injunction would constitute prior restraint. Moreover, they argue, in issuing the temporary

restraining order in this case, Judge Conti incorrectly adopted plaintiffs' overbroad interpretation of section 380.

The court has serious doubts whether plaintiffs' actions in this case constitute "governmental action," i.e., state action for purposes of invoking the protections of the fourteenth amendment. See DeFrantz v. United States Olympic Committee, 492 F.Supp. 1181 (S.D.N.Y. 1980)(decision of USOC not to participate in 1980 summer Olympic in Moscow held not state action). But see Shelly v. Kraemer, 334 U.S. 1 (1947)(judicial enforcement by state courts of restrictive covenants held to violate fourteenth amendment).

We need not reach that issue, however, because it is unlikely that defendants will be able to show an

abridgment of their freedom of speech in this case. Defendants' argument can be more precisely red as a challenge to section 380 on the ground that it is unconstitutionally overbroad. We have already explained, however, that section 380 does not establish a per se rule against the use of Olympic words and symbols, but only grants the USOC their exclusive use within "a range of uses." Our analysis above has shown how the athletic events defendants seek to put on clearly fall within the ambit of section 380. Accordingly, defendants' argument of unconstitutionality does not detract from our previous assessment of plaintiffs' probably success on the merits.

Defendants argue that, assuming section 380 to be constitutional, plaintiffs' selections of these defen-

dants as a "litigative target" represents discrimination against homosexuals, given that the USOC has not sought to enjoin other possible infringements such as the Police Olympics and the Armenian Olympics.

Homosexuals have indeed been the victims of discrimination and bigotry in other contexts. It does not follow, though, that they have been singled out for discriminatory enforcement of the Amateur Sports Act in this case. Their presence as defendants herein is easily explained by other factors. (1) Since the USOC has had available to it for less than four years civil remedies to enforce its exclusive use rights, it is understandable that there would not be a great number of previous actions. (2) Unlike most other events which use the word "Olympic" to promote a particular

event, the Gay "Olympic" Games are closely modeled on the Olympic Games in scope, content, ceremony, and philosophy. It therefore presents a greater infringement of plaintiffs' exclusive use rights than many other events cited by defendants.[6] (3) Finally, it is not true that the USOC has not prosecuted other civil actions under section 380. The court is aware of at lest four other section 380 suits brought by the

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[6] Plaintiffs have explained to the court that the "Special Olympics," "Junior Olympics," and "Explorer Olympics" are all either specially authorized by Congress to use the word "Olympic" or were grandfathered pursuant to section 380(a).

USOC in the last few years,[7] two of which appear to be against other non-profit organizations. Moreover, plaintiffs have indicated to the court at oral argument that a number of other potential lawsuits are in the pre-litigation negotiation stage. Such negotiations were attempted in the instant case without success.

Accordingly, since the plaintiffs have demonstrated probably success on the merits and irreparable injury, they are entitled to a preliminary injunction.

[7] See USOC v. Golden Age Olympics, Inc., Trademark Trial and Appeal board of the U.S. Patent and Trademark Office, Opposition No. 62, 425 (June 1981); USOC v. Olympic Trials Bus Company, Inc., C-80-2062 (D.C.Cir. 1980)(consent judgment and permanent injunction); National Amateur Sports Foundation v. USOC, C-80-496 (D.C.Cir. 1980)(consent decree); USOC v. David Shoe Company, Inc., C-82-596 (S.D.Ohio 1981)(permanent injunction issued).

It is hereby ORDERED that defendants, their employees, agents, officers, attorney and representatives, all persons participating with or acting in concert with them, and each of them, shall immediately cease, desist and refrain from further use of "Olympic" or "Olympiad" or any confusingly similar word, term, name, trade name or any symbol, emblem, trademark or ensignia of the International Olympic Committee or the United States Olympic Committee, or any combinations or simulations thereof, for the purpose of trade, to induce the sale of any goods or services, or in connection with any advertising, promotion, publicity or production

of any theatrical exhibition, athletic performance, competition or event pursuant to 36 U.S.C. §380.

SO ORDERED.

Dated: August 20, 1982

/s/ Robert F. Peckham
Chief United States District Judge